85-1978

Supreme Court, U.S.
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MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF FLORIDA,

vs.

URBANO TORRES,

Respondent.

On Petition for a Writ of Certiorari

to the Florida Third District Court

of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

I

WHETHER A CONVICTED FELON'S COLLATERAL ATTACK UPON HIS PLEA OF GUILTY BASED UPON HIS SWORN ASSERTION THAT THE PLEA WAS KNOWINGLY BUT NOT VOLUNTARILY ENTERED DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS SUBJECT TO THE STANDARD OF REVIEW SET FORTH IN HILL V. LOCKHART, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) AND THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL IGNORING THE PREJUDICE ISSUE AND FINDING A PER SE VIOLATION UNDER BOYKIN V. ALABAMA, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) CONSTITUTES AN EXPRESS CONFLICT WITH HILL AND OTHER STATE AND FEDERAL COURT OPINIONS.

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PROPOSITION I

A convicted felon's collateral attack upon his plea of guilty based upon his sworn assertion that the plea was knowingly but not voluntarily entered due to ineffective assistance of trial counsel is subject ot the standard of review set forth in Hill v. Lockhart, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) and the decision of the Florida District Court of Appeal ignoring the prejudice issue and finding a per se violation under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) constitutes an express conflict with Hill and other state and federal court opinions.

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I

OPINION BELOW

The opinion of the Florida Third District Court of Appeal on Respondent's collateral appeal from the trial court order denying a Motion to Vacate his guilty plea is reported as Torres v. State ____ So.2d____ (Fla. 3d DCA 1986) (A. 1) [1].

The lack of a direct and express conflict on the face of this opinion precluded the Petitioner from invoking the discretionary review jurisdiciton of the Florida Supreme Court. See, e.g. Carter v. State, 331 So.2d 293 (Fla. 1976).

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[1] The symbol "A" is used to designate the appendix to this brief.

II

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17 (b) and (c) of the Rules of the Supreme Court and 28 U.S.C. §1257(3). The opinion of the Florida Third District Court of Appeal was filed on March 18, 1986. (A. 1-2). A timely filed Motion for Rehearing and/or Clarification was denied on April 14, 1986. (A. 3).

III

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution read as follows:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiciton the equal protection of the laws.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deparived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV
STATEMENT OF THE CASE

Mr. Urbano Torres pled guilty to the crime of First Degree Murder in the Circuit Court of Dade County, Florida and thereby avoided a possible death sentence. (A. 32-40). One month later he filed a Motion for Post Conviction Relief under Florida Rule of Criminal Procedure 3.850. As required by the state rule the Motion for Post Conviction Relief was accompanied by a sworn statement indicating Mr. Torres had read the motion and had personal knowledge that the facts and matters contained in the motion were true. (A. 29). Ground one of the motion asserted that the plea of guilty was not voluntary with an understanding of the consequences of said plea. (A. 25). Mr. Torres admitted he pled guilty out of fear for his life because his lawyer rufused to make any effort towards

preparing a defense. The trial court held an evidentiary hearing on the motion. (A. 10-15). Torres was represented by a Public Defender and testified in support of his motion. (A. 10-15). At that time he again admitted his plea was knowingly made but, none-the-less, involuntary. The trial court denied the motion. (A. 30)

The guilty plea colloquy is not a model for other courts to follow. However, it does clearly indicate that Mr. Torres knew he was pleading guilty to charges of First Degree Murder in exchange for the State's agreement not to seek the death penalty. (A. 35-37). The record shows a lawyer was appointed to represent Mr. Torres and did so at every necessary stage of the proceedings. (A. 32-40); that Mr. Torres knew he was waiving his right to a jury trial and right to appeal his conviction and sentence. (A. 35-37);

and lastly, that the plea was supported by facts set forth in three suppression motions which focused on the live testimony of various witnesses and the detailed, recorded confession of the Respondent. The prosecution proffered that evidence as a basis for showing a prima facie case of guilt and the defense did not object. (A. 37-38).

Florida's Third District Court of Appeal summarily reversed the trial court and ordered the plea of guilty set aside upon the singular authority of Boykin v. Alabama, 395 U.S. 238 (1969). (A. 1-2). The lack of any express or direct conflict with other decisions of the State Supreme Court or State Courts of Appeal foreclosed any further litigation in the State Court system. Rehearing was denied and a mandate issue on April 30, 1986.

V

REASONS FOR GRANTING CERTIORARI

PROPOSITION I

A convicted felon's collateral attack upon his plea of guilty based upon his sworn assertion that the plea was knowingly but not voluntarily entered due to ineffective assistance of trial counsel is subject to the standard of review set forth in Hill v. Lockhart, 474 U.S. ____, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) and the decision of the Florida District Court of Appeal ignoring the prejudice issue and finding a per se violation under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) constitutes an express conflict with Hill and other state and federal court opinions.

The Florida Third District Court of Appeal has incorrectly applied the rule of Boykin v. Alabama, 395 U.S. 238 (1968) to a set of facts which required the application of the rule of Hill v. Lockhart, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). By refusing to consider the Defendant's sworn allegations of ineffective assistance of trial counsel

and attendent threats of imposition of the death penalty under the Hill standard, the lower court has created conflict with this Court's recent declaration that the fundamental interest in the finality of guilty pleas is not to be easily overlooked. Hill, at 88 L.Ed.2d 209-210. While the opinion of the state court says little about why the decision was made to reverse this judgment and set aside the guilty plea the sworn motion to vacate filed by Respondent and his testimony during the evidentiary hearing. (A. 12-13, 25-26) speaks volumes as to why this Court should intercede by summarily reversing the decision and instructing the Florida appellate court to consider this appeal under the standard enunciated in HIll, supra

The Florida Court's unexplained reference to Boykin, (A. 2), suggests an opinion that there was a lack of

significant personal exchange between the trial judge and the Respondent on the various rights which are waived by a guilty plea. If that perception is behind what occured below the Court badly missed the mark in evaluating the allegations contained in the Motion for Post-Conviction Relief and the testimony given by Respondent at the evidentiary hearing. Nowhere in those pleadings or remarks does Respondent raise a complaint about the accuracy or adequacy of the plea colloquy. His complaint was solely that he was forced to plead guilty to save his life. (A. 25) The trial court rule on that issue alone and correctly held the motion was insufficient because the fear of the possible punishment does not alone constitute grounds of involuntariness, Brown v. Perini, 718 F.2d 784, 786 (6th Cir. 1983)(citing Brady v. United States, 397 U.S. 749 (1970) for proposition that

a guilty plea is not involuntary just because it was entered to avoid the possible imposition of the death penalty.), see also Blue v. Wainwright, 739 F.2d 320, 322 (8th Cir. 1984) and Jones v. Parker, 734 F.2d 1142, 1147 (6th Cir. 1984); and because the trial court had previously stated during the plea colloquy that it was aware of the trial counsel's diligent pre-trial investigation and preparation of the case. (A. 37). Under Hill v. Lockhart, the motion and supporting argument does not allow a reversal on grounds that the plea was not knowingly and voluntarily entered on advice of competent counsel. Respondent knew what he was giving up by pleading guilty and answered "yes" when asked if his reason for pleading guilty was to avoid the death penalty. (A. 37). He never asserted that the plea was not made with full understanding of the rights he

would forfeit. Furthermore, at no time did the Respondent argue that the record of the plea colloquy failed to conclusively rebut his allegations. Respondent simply asserted that the plea, although knowingly made, was involuntarily and that the lack of voluntariness was strictly the fault of his hostile trial counsel. (A.14-15). Such allegations fall under the rule of Hill not Boykin and require both allegation and proof of prejudice-something not raised here.

The Petitioner gave the lower court plenty of opportunity to rule under the Hill standard. (A. 4-17). The refusal to do so indicates a clear departure from precedent which, given the seriousness of the crime, merits this Court's attention. A summary reversal with instruction to reconsider the case under the appropriate standard would satisfy the Petitioner that

justice would be done in this most usual matter.

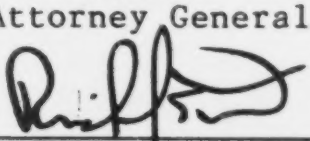
VI

CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerning the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this _____ day of June, 1986, at Tallahassee, Florida.

JIM SMITH
Attorney General



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NO.

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October Term, 1985

THE STATE OF FLORIDA,

vs.

URBANO TORRES,

Respondent.

On Petition for a Writ of Certiorari

to the Florida Third District

Court of appeal

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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A.

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA,**

Appellee. **

Opinion filed March 18, 1986.

Rehearing Denied April 14, 1986

An Appeal from the Circuit Court for Dade County, Ralph N. Person, Judge.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Assistant Public Defender, for appellant.

Jim Smith, Attorney General, and Richard E. Doran, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and HUBBART and DANIEL S. PEARSON, JJ.

PER CURIAM.

The order denying the defendant's motion for post-conviction relief is reversed upon a holding that the evidence before the trial court indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Williams v. State, 316 So.2d 267 (Fla. 1975).

Reversed and remanded for further proceedings.

A. 3

IN THE DISTRICT
COURT OF APPEAL OF
FLORIDA THIRD DISTRICT

JANUARY TERM, A.D.
1986
MONDAY, APRIL 4,
1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA, **

Appellee. **

**

Upon consideration, appellee's motion for rehearing and/or certification of question to the Florida Supreme Court is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: _____
Deputy Clerk

cc: Richard E. Doran
Elliot Scherker

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT

Appellee, State of Florida, respectfully moves for rehearing and clarification of the court's opinion in this case issued March 18, 1986 pursuant to Rule 9.330(a), Fla.R.App.P (1986). In support of this motion Appellee contends:

I. The court has overlooked the Appellee's supplemental cases of Hill v. Lockhart, 473 U.S.__,106 S.Ct.366 (1985)

and United States v. Guichard, 779 F.2d 1139 (5th Cir. 1986) which are directly and expressly in conflict with the views expressed by the panel. The Fifth Circuit's Guichard opinion states:

> Rule 11 "creates a prophylactic scheme designed to insure both that guilty pleas are constitutionally made and that a full record will be available in the event that a challenge is made to the plead." United States v. Adams, 634 F.2d 830, 837 (5th Cir.1981). To this end, Rule 11 specifieds a long list of substantive and procedural requirements to be observed before a guilty plea is accepted. This Court does not, however, require "letter-perfect" compliance with all of these requirements. See United States v. Dayton, 504 F.2d 931, 939 (Cir. 1979) (en banc), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980). Indeed, in 1983 Rule 11(h) was added to ensure application of a harmless error rules in appeals based on noncompliance.

In Dayton, we held en banc that if the three core concerns of Rule 11 are met--that the guilty plead is free from coercion, that the accused understands the nature of the charges against him, and that the accused knows the direct consequences of his guilty plea--there is no violation of the body or spirit of Rule 11. Dayton, supra, at 939-40. We found that reversible error exists only when there is an "entire failure" to address any of the three core concerns of Rule 11. Id. at 939-40. However, an "inadequate address," or less than "letter-perfect" compliance with Rule 11, is harmless error if the three core concerns are met and the accused has shown a desire "to come to terms with the legal system, and to admit his fault." Id. at 940. We noted that an earlier intimation by the Supreme Court that "prejudice inheres in a failure to comply with Rule 11," McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 1173, 22 L.Ed.1.2d 418 (1969), concerned a much simpler version of Rule 11 than the Rule at issue in Dayton. Dayton, supra, at 939-40. McCarthy, we found, was concerned with the core values of Rule 11 and should not be extrapolated to require/

strict compliance with the "punctilios" of a now greatly expanded and more detailed Rule 11. Id. at 940. The dissent in Dayton disagreed with this analysis, observing that "[a]lone among the circuits that have considered the question, this court now refuses to require literal compliance with Rule 11." Id. at 948 (footnote omitted). Thus even before the adoption of Rule 11(h) we held that specific Rule 11 rights are often ancillary to the larger McCarthy concerns, and that all Rule 11 errors do not therefore require automatic reversal.

Confrontation of Witnesses

Appellant claims that during the Rule 11 proceeding accompanying his guilty plea the district judge failed to warn him that his plea waived his right to confront the witnesses against him, as required by Rule 11(c)(3). The record does indeed indicate that the district court neglected expressly to inform appellant that a guilty plea waived his right to confront witnesses, but the record also shows that all of the other requirements of Rules 11, in particular Rule 11(c), were met. Thus, as appellant claims, the record

contains technical error. As noted, however, reversal requires more than this; it requires an entire failure to meet a core concern. See id.

[1] Of the three core concerns of Rule 11, only the requirement that the accused knows the direct consequences of his plead is implicated when the accused alleges that he was not informed that a guilty plea waived his right of confrontation. In determining whether the appellant was knowledgeable of these consequences, we observe that he was informed of all other Rule 11 rights, including, inter alia, that he waived the right to a jury trial, that he waived the right not to testify against himself, that he knew the maximum penalty against him, and that he waived the right to force the state to meet its burden of proof beyon a reasonable doubt. See note 3, supra. Where, as here, the only deficiency respecting this core concern is the singular failure to mention one Rule 11(c) right, here the right of confrontation, we cannot hold that this constitutes an "entire failure"to inform the appellant of the consequences of his plea. Appellant knew he had waived a trial at which he did not have to testify and the

government had to affirmatively prove his guilt, and could not rely on any failure of his to testify, all of which to a significant extent implies a waiver of the right of confrontation. Moreover, we observed that appellant had the competent counsel who obviously had advised him both of the charge and the ramifications of a guilty plea. We find, therefore, that appellant knew the consequences of his plea. United States v. Caston, 615 F.2d 1111, 1115-16 (5th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).

Additionally, in the past we have held similar types of errors harmless. See Caston, supra, at 1115-16. In Caston, for example, we held that despite the district judge's failure to inform the defendant of his right to a jury, of his right to the assistance of counsel at trial, of his right not to incriminate himself at trial, and that his sworn answers to the court's questions could be used against him in perjury charges, all of which are required by Rule 11, the error was harmless. Caston, supra.

* * *

Our analysis is further strengthened by the addition of

> section (h) in the 1983 amendments to Rule 11, providing: "Any variance from the procedures required by this rule which does not affect substantive rights shall be disregarded." This amendment reversed the per se doctrine then in vogue for Rule 11 violations, see Dayton, supra, at 948 (dissent), and instituted a harmlelss error analysis. Like Fed.R.Crim.P. 52(a), the harmless error provision for most other criminal case procedural violations see Rule 11(h) advisory committee notes (discussing how McCarthy led many appellate courts to reject harmless errors for Rule 11 cases), the new Rule 11(h) does not attempt to define harmless error.
>
> Id. at 1142-43. (Footnotes omitted) (emphasis added).

What was alleged below, as is so clearly evidenced by the motion to vacate[1] and supplemental transcript of the

---

[1] The motion to vacate alleges:

A. Ground One: Conviction obtained by plea of guilty which was not made volun-

February 6, 1984, evidentiary hearing, is a claim of ineffective assistance of counsel which caused the defendant to plead guilty out of fear for his life:

tarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defenant unwillingly peaded guilty.

[MR. EVANS]: Now, in your affidavit you say that when you asked your attorney what you should do, you say he did not appear to be willing to use his full abilities to prevent a conviction and that seeing no possible way, you confessed, and that your attorney told you that you would possibly get the death penalty if you didn't confess and plead guilty. Are those the allegations that you are making against your former attorney?

A. Yes.

Q. Tell me what happened between you and the attorney, what he said, what you said and why you pled guilty.

A. About three or four--sometime--three or four days before I was sentenced, the attorney the gentleman who was there, went to the cells there down below and he told me that they were asking the electric chair for me.

I told him that I was innocent, that, please, to do someting for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said, yes. He said, why? That is because I have no family there and I was scared that my mother should find out that they

> had--that they had put me in the electric chair.
>
> (S.R.8).

Based on the allegations made in the pro se motion to vacate sentence (R.121) and during the evidentiary hearing of February 6, 1984, the defendant was required to allege and prove prejudice, as argued vigorously by appellee but, apparently, overlooked by the court. The United States Supreme Court could not have been more clear in the Hill case.

> In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of inefective assistance of counsel will serve the fundamental interes in the finality of guilty pleas we identified in Unted States v. Timmreck, 441 U.S. 780, 99 S.Ct.2085, 60 L.Ed.2d 643 (1979).
>
> Id. at 106 S.Ct. 370.

It appears that the panel's review of the issue of a "knowing and voluntary" waiver of rights has focused on the "knowing" element instead of the "voluntary" element. If this is true, the court has overlooked the specific allegations in the motion to vacate (R.121) and the statements of the appellant at the hearing when questioned by his assistant public defender as to the thrust of his complaint:

> Q. During this conversation did you understand everything that was being said to you through the interpreter?
>
> A. Yes.
>
> Q. You have sworn to the allegations set forth in this motion that you filed; correct?
>
> A. Yes.
>
> Q. In this affidavit that you swore to you state, "Seeing no pos-

sible way to win in this situation, sinxw his Court-appointed counsel did not"--

A. Yes---

Q. --conviction and given the threat to the police, the defendant unequivocally plead guilty."

Is that your allegation today in Court?

A. Yes.

MR. EVANS That's it for me at this point.

(S.R.11).

The record unequivocally refutes the notion that the plea was not "knowingly" made and refutes the notion that appellant did not understand either the charges against him or the direct consequences of the plea. This is why Boykin v. Alabama, 395 U.S. 238 (1969) does not control in this matter! The only specific omssions of constitutional rights in the plea colloquy were the indications of a

right to compel the production of evidence and the right to cross-examination. These constitutional concerns are not core requirements of the plea, Guichard, supra, and the failure to include them in the process of the plea colloquy does not, absent a showing of prejudice, render this guilty plea invalid. Rule 3.172(i), Fla.R.Cirm.P. (1977). Appellee contends the panel has overlooked this crucial distinction between cases where there is a voluntarily guilty plea without any understanding of what that action means and cases, such as this one, where a defendant knows what he is doing and what it means, but claims he had no other choice because his lawyer would not help him win his case.

Wherefore, appellee respectfully requests the court recall this opinion and affirm the order of the trial court. In this alternative, appellee requests the court certify the question to the Florida Supreme Court.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
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(305) 377-5441

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT was furnished by mail to ELLIOT SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 21 day of March, 1986.

/s/
RICHARD E. DORAN
Assistant Attorney General

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. / CASE NO. 83-4248
/
URBANO TORRES, /
/
Defendant. /
/
_____/

MOTION FOR POST CONVICTION RELIEF

COMES NOW the defendant URBANO TORRES, pro se, pursuant to the allowance of Rule 3.850 Fla.R.Crim.P., and moves this Court as aforesaid, alleging the following in support hereof:

1. Name and location of the Court which entered the Judgment of Conviction under attack: Eleventh Judicial Circuit Court, in and for Dade County, Miami, Florida .

2. Date of Judgment of conviction: October 4, 1983 .

3. Length of Sentence: Life .

4. Nature of offenses(s) involved

(all counts): _____
Murder First Degree _____.

5. What was your plea? (check only one).

(a) Not guilty ____
(b) Guilty XX
(c) Nolo contendere ____
(d) Not guilty by reason of insanity ____

If you entered one plea to one count, and a different plea to another count, give details: _____.

6. Kind of trial (check only one):

(a) Jury___
(b) Judge only, without jury XX

7. Did you testify at the trial or at any pre-trial hearing?

Yes____ No XX

8. Did you appeal from the Judgment of conviction?

Yes_____ No XX

9. If you did appeal, answer the following:

(a) Name of Court:_____
(b) Result:_____
(c) Date of result:_____
(d) Citation (if known):_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions,

etc., with respect to this judgment in this court?

Yes____ No __XX__

11. If your answer to number 10 was "yes" give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceedings:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____ No_____

(4) Result:_____

(5) Date of result:_____

(b) As to any second petition, application, motion etc., give the same information:

(1) Nature of proceeding:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No _____

(4) Result:_____

(5) Date result:_____

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other court?

Yes ____ No XX

13. If your answer to number 12 was "yes" give the following information:

(a) (1) Name of Court:_____

(2) Nature of the proceedings:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, applicaiton, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(b) As to any second petition, application, motion, etc., give the same informaiton:

(1) Name of Court:_____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application, motion, etc., give the same informaiton:

(1) Name of Court: _____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.
For you information, the following is a list of the most frequently

raised grounds for post conviciton relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.
DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (l)

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(k) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(l) Sentence in excess of the maximum authorized by law.

A. Ground One: Conviction obtained by plea of guilty which was not made voluntarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney

for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

B. Ground Two: Conviction obtained by used of coerced confession.

Supporting FACTS (tell your story briefly without citing cases or law).

The victim in this case was a good friend of the Defendant. Although the Defendant was read his rights under the Miranda decision, he confessed to the crime due to the threat of the police interrogation team that unless he did confess, he would receive the death penalty for his offense. Defendant was sufficiently frightened by this threat that the dry, pro forma reading of the Miranda rights did not make an impression. Defendant did not ask for an attorney until September, 1983, after being arrested and giving his confession in February, 1983, some seven months earlier, Defendant asserts that the threat of the electric chair by the police was unduly coercive and resulted in his confession.

C. Ground Three: _____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

D. Ground Four:_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

15. If any of the grounds listed in 14A. B. C. and D were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not so presented:

No appeal was taken, or could be taken, from a guilty plea.

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either state or federal, as to the judgment under attack?

Yes ____ No XX

17. If your answer to number 16 was "yes", give the following information:

(a) Name of Court:_____

(b) Nature of the proceeding:_____

_____

(c) Grounds raised: _____

_____

(d) Status of the proceedings:

_____

18. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing: Harold T. Fields, Jr., Suite 204, 1333 Coral Way, Miami, Florida 33145

(b) At arraignment and plea: Harold T. Fields, Jr.

(c) At trial: Not Applicable

(d) At sentencing: Harld T. Fields Jr.

(e) On appeal: Not Applicable

(f) In any post conviction proceedings: Pro se

(g) On appeal from any adverse ruling in a post conviction proceeding: Not Applicable

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including not not limited to:

1. That the Court order an evidentiary hearing be held in the issues of involuntary plea and coerced confession and appoint a Special Public Defender to represent Defendant therein.

2. That the Court allow Defendant to withdraw his guilty plea and proceed to trial on the charges, and order the suppression of Defendant's coerced confession.

3. Such other and further relief as the Court deems just and proper.

STATE OF FLORIDA)
) ss.
COUNTY OF UNION)

Before me, the undersigned authority, this day personally appeared URBANO TORRES who first being duly sworn, says that he is the Defendant in the above styled cause that he has read the foregoing Motion for Post Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct to the best of his knowledge and belief.

/s/
Defendant, pro se

SWORN AND SUBSCRIBED TO before me this 3rd day of November, 1983.

/s/
NOTARY PUBLIC STATE OF FLORIDA

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES NOV. 5, 1983

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
VS# 83-4248
URBANO ACUNAS TORRES AKA:
RAFAEL HERNANDEZ
Defendant

ORDER DENYING MOTION FOR RELIEF PURSUANT TO RCrP 3.850

THIS CAUSE HAVING COME ON BEFORE the Court upon the Motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined the said Motion and finding that the allegations contained therein do not constitute legal grounds for granting a New Trial or release of the prisoner, and the Motion being insufficient in substance to support the relief prayed, it is thereupon,

CONSIDERED, ORDERED AND ADJUDGED that the Motion for Relief pursuant to RULE 3.850, Criminal Procedure, filed by the

above prisoner be, and the same is hereby DENIED.

The movant is advised that ___ he has the right to appeal within thirty days of the rendition of this order and is further advised that ___ he may file a Motion for rehearing with fifteen days of the date of service of this order.

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 16th day of March, A.D., 1984.

/s/
Judge
RALPH N. PERSON

I CERTIFY that copy hereof has been furnished to movant, Urbano Acunas Torres aka Rafael Hernandez, by mail this 19 day of March, 19 84.

RICHARD P. BRINKER, Clerk

By: /s/
Deputy Clerk

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

STATE OF FLORIDA,	
	CRIMINAL DIVISION
Plaintiff,	
vs.	CASE NO. 83-4248
URBANO TORRES,	
Defendant.	

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida
October 4, 1983
Tuesday, 9:00 a.m.

The above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

HAROLD FIELDS, ESQ.,
on behalf of the Defendant.

ALSO PRESENT:

ANA SHORE, Interpreter

MR. NOVICK: The interpreter is here and we have the defendant.

There is a negotiated plea in this particular case.

It is my understanding that the defendant is going to plead guilty as charged to the indictment and be sentenced to life in prison with a mandatory 25 years for the first-degree murder, and whatever sentence the Court wants to run concurrent; not consecutive.

MR. FIELDS: Yes.

THE COURT: All right.

Raise your right hand and be sworn.

(Thereupon, ANA SHORE, was qualified as the interpreter.)

(Thereupon, URBANO TOREES, a defendant, was duly sworn, after which the following proceedings were had):

THE COURT: All right.

Mr. Torres, please state your name, for the record.

THE DEFENDANT: (Through the interpreter) Urbano Torres.

THE COURT: How old are you, please?

THE DEFENDANT: Twenty years,

THE COURT: Mr. Torres, are you aware of the charges against you?

THE DEFENDANT: Yes, I am.

THE COURT: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that the State was seeking the death penalty in your case as you are well aware.

Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already been removed by the Court against you, and your electing, at this

point, to enter a plea after having fought the case up to this point; is that correct?

You're entering this plea of guilty; is that correct?

MR. FIELDS: Can I have an opportunity to speak to him, your Honor?

THE COURT: Sure, you may.

(Thereupon, other matters were called after which the following proceedings were had on Urbano Torres):

MR. NOVICK: Judge, back on Urbano Torres' case.

THE COURT: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court from a trial if we

were to, but which we are not having a trial.

You are stipulating to a prima facie case of guilt here and need ---

MR. NOVICK: I would ask the Court to relay what we heard yesterday.

THE COURT: I think we did hear during the suppression, no objection utilates those factors; the purpose of finding a prima facie case of guilt.

The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be five good aggravating--one of which is involvement in the other similar type of case in the past. Even though ultimately ended up with not a deathly but an aggravate the crime. But there was death involved; was there not?

MR. NOVICK: Correct. Wasn't similar. In fact there was in Los Angeles.

THE COURT: Mr. Torres, under the circumstances, is this what you are going to do?

THE DEFENDANT: Yes.

THE COURT: I know Mr. Fields has spent a lot of time working on this case, traveling around the country.

Are you satisfied that he understands the nature of this and appreciate the consequences of this guilty plea?

MR. FIELDS: Yes, your Honor.

THE COURT: All right.

The Court at this time, based upon the stipulated facts during the suppression hearing, the Court finds that you are doing this freely and voluntarily.

Mr. Torres has been represented by a competent attorney and the Court will

find the facts which the State would be prepared to prove and which admitted by your plea of guilt would be sufficient to sustain the finding of guilt by the trier of fact.

All right. Judgment sentence-- the Court as to count one, the Court will sentence you to a term of life inprisonment.

Count two, being a concurrent 15 and pursuant to the statute, 25 year minimum mandatory. Even though I didn't read the confession in this case, I know the motions were directed towards the suppression of confession in Court. As a matter of fact, I didn't read the confession.

MR. NOVICK: As a matter of fact, but they were introduced in evidence. They are there for the record.

THE COURT: Okay.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings had in the case of the State of Florida versus Urbano Torres, Case Number 83-4248, before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 13th day of February, 1984.

/s/
LISA J. JOHNSON
Shorthand Reporter

A.

APPENDIX

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA,**

Appellee. **

Opinion filed March 18, 1986.

Rehearing Denied April 14, 1986

An Appeal from the Circuit Court for Dade County, Ralph N. Person, Judge.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Assistant Public Defender, for appellant.

Jim Smith, Attorney General, and Richard E. Doran, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and HUBBART and DANIEL S. PEARSON, JJ.

PER CURIAM.

The order denying the defendant's motion for post-conviction relief is reversed upon a holding that the evidence before the trial court indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Williams v. State, 316 So.2d 267 (Fla. 1975).

Reversed and remanded for further proceedings.

A. 3

IN THE DISTRICT
COURT OF APPEAL OF
FLORIDA THIRD DISTRICT

JANUARY TERM, A.D.
1986
MONDAY, APRIL 4,
1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA, **

Appellee. **

**

Upon consideration, appellee's motion for rehearing and/or certification of question to the Florida Supreme Court is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: _____
Deputy Clerk

cc: Richard E. Doran
Elliot Scherker

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT

Appellee, State of Florida, respectfully moves for rehearing and clarification of the court's opinion in this case issued March 18, 1986 pursuant to Rule 9.330(a), Fla.R.App.P (1986). In support of this motion Appellee contends:

I. The court has overlooked the Appellee's supplemental cases of Hill v. Lockhart, 473 U.S.__,106 S.Ct.366 (1985)

and United States v. Guichard, 779 F.2d 1139 (5th Cir. 1986) which are directly and expressly in conflict with the views expressed by the panel. The Fifth Circuit's Guichard opinion states:

> Rule 11 "creates a prophylactic scheme designed to insure both that guilty pleas are constitutionally made and that a full record will be available in the event that a challenge is made to the plead." United States v. Adams, 634 F.2d 830, 837 (5th Cir.1981). To this end, Rule 11 specifieds a long list of substantive and procedural requirements to be observed before a guilty plea is accepted. This Court does not, however, require "letter-perfect" compliance with all of these requirements. See United States v. Dayton, 504 F.2d 931, 939 (Cir. 1979) (en banc), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980). Indeed, in 1983 Rule 11(h) was added to ensure application of a harmless error rules in appeals based on noncompliance.

In Dayton, we held en banc that if the three core concerns of Rule 11 are met--that the guilty plead is free from coercion, that the accused understands the nature of the charges against him, and that the accused knows the direct consequences of his guilty plea--there is no violation of the body or spirit of Rule 11. Dayton, supra, at 939-40. We found that reversible error exists only when there is an "entire failure" to address any of the three core concerns of Rule 11. Id. at 939-40. However, an "inadequate address," or less than "letter-perfect" compliance with Rule 11, is harmless error if the three core concerns are met and the accused has shown a desire "to come to terms with the legal system, and to admit his fault." Id. at 940. We noted that an earlier intimation by the Supreme Court that "prejudice inheres in a failure to comply with Rule 11," McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 1173, 22 L.Ed.1.2d 418 (1969), concerned a much simpler version of Rule 11 than the Rule at issue in Dayton. Dayton, supra, at 939-40. McCarthy, we found, was concerned with the core values of Rule 11 and should not be extrapolated to require/

strict compliance with the "punctilios" of a now greatly expanded and more detailed Rule 11. Id. at 940. The dissent in Dayton disagreed with this analysis, observing that "[a]lone among the circuits that have considered the question, this court now refuses to require literal compliance with Rule 11." Id. at 948 (footnote omitted). Thus even before the adoption of Rule 11(h) we held that specific Rule 11 rights are often ancillary to the larger McCarthy concerns, and that all Rule 11 errors do not therefore require automatic reversal.

Confrontation of Witnesses

Appellant claims that during the Rule 11 proceeding accompanying his guilty plea the district judge failed to warn him that his plea waived his right to confront the witnesses against him, as required by Rule 11(c)(3). The record does indeed indicate that the district court neglected expressly to inform appellant that a guilty plea waived his right to confront witnesses, but the record also shows that all of the other requirements of Rules 11, in particular Rule 11(c), were met. Thus, as appellant claims, the record

contains technical error. As noted, however, reversal requires more than this; it requires an entire failure to meet a core concern. See id.

[1] Of the three core concerns of Rule 11, only the requirement that the accused knows the direct consequences of his plead is implicated when the accused alleges that he was not informed that a guilty plea waived his right of confrontation. In determining whether the appellant was knowledgeable of these consequences, we observe that he was informed of all other Rule 11 rights, including, inter alia, that he waived the right to a jury trial, that he waived the right not to testify against himself, that he knew the maximum penalty against him, and that he waived the right to force the state to meet its burden of proof beyon a reasonable doubt. See note 3, supra. Where, as here, the only deficiency respecting this core concern is the singular failure to mention one Rule 11(c) right, here the right of confrontation, we cannot hold that this constitutes an "entire failure"to inform the appellant of the consequences of his plea. Appellant knew he had waived a trial at which he did not have to testify and the

government had to affirmatively prove his guilt, and could not rely on any failure of his to testify, all of which to a significant extent implies a waiver of the right of confrontation. Moreover, we observed that appellant had the competent counsel who obviously had advised him both of the charge and the ramifications of a guilty plea. We find, therefore, that appellant knew the consequences of his plea. United States v. Caston, 615 F.2d 1111, 1115-16 (5th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).

Additionally, in the past we have held similar types of errors harmless. See Caston, supra, at 1115-16. In Caston, for example, we held that despite the district judge's failure to inform the defendant of his right to a jury, of his right to the assistance of counsel at trial, of his right not to incriminate himself at trial, and that his sworn answers to the court's questions could be used against him in perjury charges, all of which are required by Rule 11, the error was harmless. Caston, supra.

* * *

Our analysis is further strengthened by the addition of

> section (h) in the 1983 amendments to Rule 11, providing: "Any variance from the procedures required by this rule which does not affect substantive rights shall be disregarded." This amendment reversed the per se doctrine then in vogue for Rule 11 violations, see Dayton, supra, at 948 (dissent), and instituted a harmlelss error analysis. Like Fed.R.Crim.P. 52(a), the harmless error provision for most other criminal case procedural violations see Rule 11(h) advisory committee notes (discussing how McCarthy led many appellate courts to reject harmless errors for Rule 11 cases), the new Rule 11(h) does not attempt to define harmless error.
>
> Id. at 1142-43. (Footnotes omitted) (emphasis added).

What was alleged below, as is so clearly evidenced by the motion to vacate[1] and supplemental transcript of the

---

[1] The motion to vacate alleges:

A. Ground One: Conviction obtained by plea of guilty which was not made volun-

February 6, 1984, evidentiary hearing, is a claim of ineffective assistance of counsel which caused the defendant to plead guilty out of fear for his life:

tarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defenant unwillingly peaded guilty.

[MR. EVANS]: Now, in your affidavit you say that when you asked your attorney what you should do, you say he did not appear to be willing to use his full abilities to prevent a conviction and that seeing no possible way, you confessed, and that your attorney told you that you would possibly get the death penalty if you didn't confess and plead guilty. Are those the allegations that you are making against your former attorney?

A. Yes.

Q. Tell me what happened between you and the attorney, what he said, what you said and why you pled guilty.

A. About three or four--sometime--three or four days before I was sentenced, the attorney the gentleman who was there, went to the cells there down below and he told me that they were asking the electric chair for me.

I told him that I was innocent, that, please, to do someting for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said, yes. He said, why? That is because I have no family there and I was scared that my mother should find out that they

> had--that they had put me in the electric chair.
>
> (S.R.8).

Based on the allegations made in the pro se motion to vacate sentence (R.121) and during the evidentiary hearing of February 6, 1984, the defendant was required to allege and prove prejudice, as argued vigorously by appellee but, apparently, overlooked by the court. The United States Supreme Court could not have been more clear in the Hill case.

> In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of inefective assistance of counsel will serve the fundamental interes in the finality of guilty pleas we identified in Unted States v. Timmreck, 441 U.S. 780, 99 S.Ct.2085, 60 L.Ed.2d 643 (1979).
>
> Id. at 106 S.Ct. 370.

It appears that the panel's review of the issue of a "knowing and voluntary" waiver of rights has focused on the "knowing" element instead of the "voluntary" element. If this is true, the court has overlooked the specific allegations in the motion to vacate (R.121) and the statements of the appellant at the hearing when questioned by his assistant public defender as to the thrust of his complaint:

> Q. During this conversation did you understand everything that was being said to you through the interpreter?
>
> A. Yes.
>
> Q. You have sworn to the allegations set forth in this motion that you filed; correct?
>
> A. Yes.
>
> Q. In this affidavit that you swore to you state, "Seeing no pos-

sible way to win in this situation, sinxw his Court-appointed counsel did not"--

A. Yes---

Q. --conviction and given the threat to the police, the defendant unequivocally plead guilty."

Is that your allegation today in Court?

A. Yes.

MR. EVANS That's it for me at this point.

(S.R.11).

The record unequivocally refutes the notion that the plea was not "knowingly" made and refutes the notion that appellant did not understand either the charges against him or the direct consequences of the plea. This is why Boykin v. Alabama, 395 U.S. 238 (1969) does not control in this matter! The only specific omssions of constitutional rights in the plea colloquy were the indications of a

right to compel the production of evidence and the right to cross-examination. These constitutional concerns are not core requirements of the plea, Guichard, supra, and the failure to include them in the process of the plea colloquy does not, absent a showing of prejudice, render this guilty plea invalid. Rule 3.172(i), Fla.R.Cirm.P. (1977). Appellee contends the panel has overlooked this crucial distinction between cases where there is a voluntarily guilty plea without any understanding of what that action means and cases, such as this one, where a defendant knows what he is doing and what it means, but claims he had no other choice because his lawyer would not help him win his case.

Wherefore, appellee respectfully requests the court recall this opinion and affirm the order of the trial court. In this alternative, appellee requests the court certify the question to the Florida Supreme Court.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
RICHARD E. DORAN
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue,
Suite 820
Miami, Florida 33128
(305) 377-5441

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT was furnished by mail to ELLIOT SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 21 day of March, 1986.

/s/
RICHARD E. DORAN
Assistant Attorney General

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. / CASE NO. 83-4248
/
URBANO TORRES, /
/
Defendant. /
/
_____/

MOTION FOR POST CONVICTION RELIEF

COMES NOW the defendant URBANO TORRES, pro se, pursuant to the allowance of Rule 3.850 Fla.R.Crim.P., and moves this Court as aforesaid, alleging the following in support hereof:

1. Name and location of the Court which entered the Judgment of Conviction under attack: Eleventh Judicial Circuit Court, in and for Dade County, Miami, Florida .

2. Date of Judgment of conviction: October 4, 1983 .

3. Length of Sentence: Life .

4. Nature of offenses(s) involved

(all counts): _____
Murder First Degree _____.

5. What was your plea? (check only one).

(a) Not guilty ____
(b) Guilty XX
(c) Nolo contendere ____
(d) Not guilty by reason of insanity ____

If you entered one plea to one count, and a different plea to another count, give details: _____.

6. Kind of trial (check only one):

(a) Jury___
(b) Judge only, without jury XX

7. Did you testify at the trial or at any pre-trial hearing?

Yes____ No XX

8. Did you appeal from the Judgment of conviction?

Yes_____ No XX

9. If you did appeal, answer the following:

(a) Name of Court: _____
(b) Result: _____
(c) Date of result: _____
(d) Citation (if known): _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions,

etc., with respect to this judgment in this court?

Yes____ No __XX__

11. If your answer to number 10 was "yes" give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceedings:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____ No_____

(4) Result:_____

(5) Date of result:_____

(b) As to any second petition, application, motion etc., give the same information:

(1) Nature of proceeding:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No _____

(4) Result:_____

(5) Date result:_____

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other court?

Yes ____ No XX

13. If your answer to number 12 was "yes" give the following information:

(a) (1) Name of Court:_____

(2) Nature of the proceedings:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, applicaiton, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(b) As to any second petition, application, motion, etc., give the same informaiton:

(1) Name of Court:_____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application, motion, etc., give the same informaiton:

(1) Name of Court: _____

(2) Nature of the proceeding:

_____

(3) Grcunds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.
For you information, the following is a list of the most frequently

raised grounds for post conviciton relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (l)

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(k) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(l) Sentence in excess of the maximum authorized by law.

A. Ground One: Conviction obtained by plea of guilty which was not made voluntarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney

for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

B. Ground Two: Conviction obtained by used of coerced confession.

Supporting FACTS (tell your story briefly without citing cases or law).

The victim in this case was a good friend of the Defendant. Although the Defendant was read his rights under the Miranda decision, he confessed to the crime due to the threat of the police interrogation team that unless he did confess, he would receive the death penalty for his offense. Defendant was sufficiently frightened by this threat that the dry, pro forma reading of the Miranda rights did not make an impression. Defendant did not ask for an attorney until September, 1983, after being arrested and giving his confession in February, 1983, some seven months earlier, Defendant asserts that the threat of the electric chair by the police was unduly coercive and resulted in his confession.

C. Ground Three: _____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

D. Ground Four:_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

15. If any of the grounds listed in 14A. B. C. and D were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not so presented:

No appeal was taken, or could be taken, from a guilty plea.

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either state or federal, as to the judgment under attack?

Yes ____ No XX

17. If your answer to number 16 was "yes", give the following information:

(a) Name of Court:_____

(b) Nature of the proceeding:_____

_____

(c) Grounds raised: _____

_____

(d) Status of the proceedings:

_____

18. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing: Harold T. Fields, Jr., Suite 204, 1333 Coral Way, Miami, Florida 33145

(b) At arraignment and plea: Harold T. Fields, Jr.

(c) At trial: Not Applicable

(d) At sentencing: Harld T. Fields Jr.

(e) On appeal: Not Applicable

(f) In any post conviction proceedings: Pro se

(g) On appeal from any adverse ruling in a post conviction proceeding: Not Applicable

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including not not limited to:

1. That the Court order an evidentiary hearing be held in the issues of involuntary plea and coerced confession and appoint a Special Public Defender to represent Defendant therein.

2. That the Court allow Defendant to withdraw his guilty plea and proceed to trial on the charges, and order the suppression of Defendant's coerced confession.

3. Such other and further relief as the Court deems just and proper.

STATE OF FLORIDA)
) ss.
COUNTY OF UNION)

Before me, the undersigned authority, this day personally appeared URBANO TORRES who first being duly sworn, says that he is the Defendant in the above styled cause that he has read the foregoing Motion for Post Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct to the best of his knowledge and belief.

/s/
Defendant, pro se

SWORN AND SUBSCRIBED TO before me this 3rd day of November, 1983.

/s/
NOTARY PUBLIC STATE OF FLORIDA

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES NOV. 5, 1983

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
VS# 83-4248
URBANO ACUNAS TORRES AKA:
RAFAEL HERNANDEZ
Defendant

ORDER DENYING MOTION FOR RELIEF PURSUANT TO RCrP 3.850

THIS CAUSE HAVING COME ON BEFORE the Court upon the Motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined the said Motion and finding that the allegations contained therein do not constitute legal grounds for granting a New Trial or release of the prisoner, and the Motion being insufficient in substance to support the relief prayed, it is thereupon,

CONSIDERED, ORDERED AND ADJUDGED that the Motion for Relief pursuant to RULE 3.850, Criminal Procedure, filed by the

above prisoner be, and the same is hereby DENIED.

The movant is advised that ___ he has the right to appeal within thirty days of the rendition of this order and is further advised that ___ he may file a Motion for rehearing with fifteen days of the date of service of this order.

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 16th day of March, A.D., 1984.

/s/
Judge
RALPH N. PERSON

I CERTIFY that copy hereof has been furnished to movant, Urbano Acunas Torres aka Rafael Hernandez, by mail this 19 day of March, 19 84.

RICHARD P. BRINKER, Clerk

By: /s/
Deputy Clerk

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

STATE OF FLORIDA, Plaintiff,	CRIMINAL DIVISION
vs.	CASE NO. 83-4248
URBANO TORRES, Defendant.	

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida
October 4, 1983
Tuesday, 9:00 a.m.

The above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

HAROLD FIELDS, ESQ.,
on behalf of the Defendant.

ALSO PRESENT:

ANA SHORE, Interpreter

MR. NOVICK: The interpreter is here and we have the defendant.

There is a negotiated plea in this particular case.

It is my understanding that the defendant is going to plead guilty as charged to the indictment and be sentenced to life in prison with a mandatory 25 years for the first-degree murder, and whatever sentence the Court wants to run concurrent; not consecutive.

MR. FIELDS: Yes.

THE COURT: All right.

Raise your right hand and be sworn.

(Thereupon, ANA SHORE, was qualified as the interpreter.)

(Thereupon, URBANO TOREES, a defendant, was duly sworn, after which the following proceedings were had):

THE COURT: All right.

Mr. Torres, please state your name, for the record.

THE DEFENDANT: (Through the interpreter) Urbano Torres.

THE COURT: How old are you, please?

THE DEFENDANT: Twenty years,

THE COURT: Mr. Torres, are you aware of the charges against you?

THE DEFENDANT: Yes, I am.

THE COURT: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that the State was seeking the death penalty in your case as you are well aware.

Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already been removed by the Court against you, and your electing, at this

point, to enter a plea after having fought the case up to this point; is that correct?

You're entering this plea of guilty; is that correct?

MR. FIELDS: Can I have an opportunity to speak to him, your Honor?

THE COURT: Sure, you may.

(Thereupon, other matters were called after which the following proceedings were had on Urbano Torres):

MR. NOVICK: Judge, back on Urbano Torres' case.

THE COURT: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court from a trial if we

were to, but which we are not having a trial.

You are stipulating to a prima facie case of guilt here and need ---

MR. NOVICK: I would ask the Court to relay what we heard yesterday.

THE COURT: I think we did hear during the suppression, no objection utilates those factors; the purpose of finding a prima facie case of guilt.

The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be five good aggravating--one of which is involvement in the other similar type of case in the past. Even though ultimately ended up with not a deathly but an aggravate the crime. But there was death involved; was there not?

MR. NOVICK: Correct. Wasn't similar. In fact there was in Los Angeles.

THE COURT: Mr. Torres, under the circumstances, is this what you are going to do?

THE DEFENDANT: Yes.

THE COURT: I know Mr. Fields has spent a lot of time working on this case, traveling around the country.

Are you satisfied that he understands the nature of this and appreciate the consequences of this guilty plea?

MR. FIELDS: Yes, your Honor.

THE COURT: All right.

The Court at this time, based upon the stipulated facts during the suppression hearing, the Court finds that you are doing this freely and voluntarily.

Mr. Torres has been represented by a competent attorney and the Court will

find the facts which the State would be prepared to prove and which admitted by your plea of guilt would be sufficient to sustain the finding of guilt by the trier of fact.

All right. Judgment sentence-- the Court as to count one, the Court will sentence you to a term of life inprisonment.

Count two, being a concurrent 15 and pursuant to the statute, 25 year minimum mandatory. Even though I didn't read the confession in this case, I know the motions were directed towards the suppression of confession in Court. As a matter of fact, I didn't read the confession.

MR. NOVICK: As a matter of fact, but they were introduced in evidence. They are there for the record.

THE COURT: Okay.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings had in the case of the State of Florida versus Urbano Torres, Case Number 83-4248, before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 13th day of February, 1984.

/s/
LISA J. JOHNSON
Shorthand Reporter

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. ~~85-1975~~
85-1978

RECEIVED
JUN 25 1986
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

THE STATE OF FLORIDA,

Petitioner,

vs.

URBANO TORRES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

ELLIOT H. SCHERKER
Assistant Public Defender

Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1975

THE STATE OF FLORIDA,

Petitioner,

vs.

URBANO TORRES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Urbano Torres, files this brief in opposition to the petition for writ of certiorari filed by petitioner in this cause.

STATEMENT OF THE CASE

The petitioner's statement of the case sets forth an accurate recital of the procedural history of the case. Respondent's Statement of the Case will be limited to a recitation of pertinent factual aspects of the proceedings.[1]

At the commencement of the plea proceedings on October 4, 1983, in Dade County Circuit Court, the prosecutor announced that the parties had negotiated a guilty plea to first-degree murder, as charged in the indictment filed in the case, and had agreed upon a sentence of life imprisonment for that offense, with a concurrent sentence on a jointly-charged robbery count to be left to the court's discretion (P.A. 33). Respondent was then sworn, as was an interpreter to translate the proceedings for him (P.A. 33), and the following then transpired:

---

[1] The symbol "P.A." will designate petitioner's appendix and the symbol "R.A." will designate respondent's appendix.

> The Court: All right.
> Mr. Torres, please state your name, for the record.
> The Defendant: . . . Urbano Torres.
> The Court: How old are you, please?
> The Defendant: Twenty years.
> The Court: Mr. Torres, are you aware of the charges against you?
> The Defendant: Yes, I am.
> The Court: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that [sic] the State was seeking the death penalty in your case as you are well aware.
> Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already [resolved] by the Court against you, and your [sic] electing, at this point, to enter a plea after having fought the case up to this point; is that correct?

(P.A. 33-35). Respondent did not answer the court's question, and the court then asked again, "You're entering this plea of guilty; is that correct?" (P.A. 35). There was again no response, and counsel for respondent requested an opportunity to speak with him; this was granted by the court (P.A. 35).

Thereafter, the following transpired:

> Mr.Novick [assistant state attorney]: Judge, back on Urbano Torres' case.
> The Court: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court if we were to, but which we are not having a trial.
> You are stipulating to a prima facie case of guilt here and need --
> Mr. Novick: I would ask the Court to [rely] on what we heard yesterday.
> The Court: I think we did hear during the suppression [hearing], no objection utilates [sic] those factors; [for] the purpose of finding a prima facie case of guilt.
> The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as how they would be weighed in terms of death. What the State considered to be five good aggravating -- one of which is involvement in the other similar type of case in the past. . . . But there was a death involved; was there not?
> Mr. Novick: Correct. Wasn't similar. In fact there was in Los Angeles.
> The Court: Mr. Torres, under the circumstances, is this what you are going to do?
> The Defendant: Yes.

(P.A. 35-37). The court then inquired of respondent's counsel,

who agreed that he was satisfied that respondent understood "the nature of this and appreciate[d] the consequences of his guilty plea" (P.A. 37), after which the court imposed sentence (P.A. 37-38).

Respondent filed his *pro se* motion for post conviction relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, on November 8, 1983, approximately one month after the plea proceedings (P.A. 19-29). The motion alleged, in part, that the conviction had been "obtained by [a] plea of guilty which was not made voluntarily with the understanding of the consequences of the plea." (P.A. 25). The supporting facts were alleged as follows:

> Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

(P.A. 25-26).[2] The trial court appointed counsel to represent respondent, and afforded him an evidentiary hearing on the motion on February 6, 1984 (R.A. 1-57).

Respondent testified at the hearing, through an interpreter, that he is 20 years of age, that he had come to the United States from Cuba four years earlier, that he had completed the seventh grade in Cuba, and that he can neither speak nor write in English (R.A. 3, 9-10). Respondent described his conversation with his trial counsel, Mr. Fields, prior to the plea proceedings as follows:

> [T]hree or four days before I was sentenced, the attorney . . . went to the cells there down below and he told me that they were asking for the electric chair for me.
>
> I told him that I was innocent, that, please, to do something for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said

---

2 A second claim in the motion asserted that respondent's conviction had been "obtained by use of [a] coerced confession", asserting that his post-arrest statement had been secured by threats that a death sentence would be imposed if he failed to confess (P.A. 26).

yes. He said, why? That is because I have no family here and I was scared that mother should find out that they had -- that they had put me in the electric chair.

(R.A. 8). Respondent stated that his counsel had told him that the circumstances of the case and his prior record were such that the trial judge would be likely to impose a death sentence (R.A. 17-18).

Respondent stated that he had had a conversation with Mr. Fields in the jury room on the morning of October 4, 1983, with the assistance of an interpreter (R.A. 24). He was questioned as follows by the prosecutor regarding the plea colloquy:

> Q. Now, after you spoke to Mr. Fields with the interpreter on Tuesday, you came out in front of the Court, this Judge right here, right?
> A. Yes.
>
> * * *
>
> Q. And the Judge asked you a lot of questions, right?
> A. To me? No. To the lawyer. I didn't speak that day.
> Q. You didn't speak that day at all?
> A. I spoke when I did this with my hand . . . .
> Q. When you took the oath, you talked and you talked no more?
> A. No. No.
> Q. Do you remember the judge . . . asking you whether or not you wanted to plead guilty?
> A. I remember that he asked me, but I plead guilty because the lawyer had told me that if I didn't they were going to give me the electric chair.
> Q. * * * You do remember him asking you if you wanted to plead guilty?
> A. Yes.
> Q. And your answer, at least on that Tuesday, was yes?
> A. Yes.
>
> * * *
>
> Q. And the judge asked you for your age and a little bit about your education background, right?
> A. Yes.
> Q. He asked you whether you were taking any drugs or had anything wrong with your head, right?
> A. Yes. I think so. Yes.
>
> * * *
>
> Q. He asked you whether you understood, if you did plead guilty, that this was an agreement, a deal, which your attorney had worked out with me to save you from the electric chair and that you would have to spend at least 25 years in jail; the Judge

asked you whether you understood what you were going to have to do. Do you remember that?
A. Yes. I remember.
Q. . . . You remember the judge asking you whether or not everything [counsel] did was okay with you, you were satisfied with him and you said, yes, it was okay with you?
A. No, I don't remember.

(R.A. 24-26).

Mr. Fields testified that he had prepared respondent's case for trial, and had had several conversations with him during the course of which he advised respondent that the state had sufficient proof to proceed with a first-degree murder prosecution and a sentencing phase (R.A. 30-31). Mr. Fields recalled his conversation with respondent on the morning of the plea proceedings (R.A. 34), and testified that "[i]t was my opinion that I couldn't win the case, and . . . I certainly could have told him that." (R.A. 38). He also testified that respondent had maintained his innocence, but had expressed his willingness to accept the negotiated plea to a life sentence (R.A. 33-34, 37-38). Mr. Fields did not specifically recall the plea colloquy (R.A. 34).

At the conclusion of the hearing, the prosecutor advised the trial court that he had ordered transcription of the plea proceedings (R.A. 43-44). The transcript was thereafter obtained and presented to the trial court (R. 48). The court denied the motion for post-conviction relief on March 16, 1984, without stating any findings of fact or conclusions of law (R.A. 54). The written order entered by the court states that "the allegations contained [in the motion] do not constitute legal grounds for granting a [n]ew [t]rial . . . ." (P.A. 30-31).

On appeal, respondent asserted that the colloquy at the time of the plea proceedings had been insufficient to establish a knowing and intelligent waiver of the rights which were abandoned by the plea, under both federal and Florida law (R.A. 72-77). Respondent's brief noted the supporting facts which had been alleged in his *pro se* motion, and he asserted that Florida procedural law entitled him to a liberal construction of those allegations and to present this claim (R.A. 72-73). In response, petitioner contended that the plea colloquy had satisfied "minimum due process standards", and that Florida procedural

rules required respondent to demonstrate prejudice from any deficiency in the plea proceedings (R.A. 87-89).

In reversing the trial court's order, the state appellate court held that "the trial court indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences." (P.A. 2; citations omitted).[3] Petitioner's motion for rehearing asserted that *Hill v. Lockhart*, ___U.S.___, 106 S.Ct. 366 (1985), establishing the standard for review of guilty pleas challenged on the ground of ineffective assistance of counsel, was controlling, and that respondent's failure to prove prejudice disentitled him to relief. (P.A. 13). The motion for rehearing was summarily denied (P.A. 3).

REASONS FOR DENYING THE WRIT

THE STATE APPELLATE COURT, WHICH WAS EMPOWERED BY FLORIDA LAW TO ADDRESS THE VOLUNTARINESS OF RESPONDENT'S GUILTY PLEA ON HIS APPEAL FROM THE STATE COURT'S DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF, WAS NOT COMPELLED BY THE UNITED STATES CONSTITUTION TO ALSO ADDRESS ANY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH MAY HAVE BEEN IMPLICITLY RAISED IN THE MOTION.

Respondent's *pro se* motion for post conviction relief asserted that his conviction had been "obtained by [a] plea of guilty was not made voluntarily with the understanding of the consequences of the plea." (P.A. 25). The state appellate court ruled that the record of the case supported this claim, holding that the state trial court had "indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences." (P.A. 2; citations omitted). Petitioner contends that the state court, in passing upon this claim, was obligated by the federal constitution to apply the standards enunciated in *Hill v. Lockhart*, ___U.S.___, 106 S.Ct.

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3 The decision cited to *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Williams v. State*, 316 So.2d 267 (Fla. 1975).

366 (1985), and that its failure to do so presents a constitutional question reviewable in this Court on a writ of certiorari.

Hill v. Lockhart applied the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), to a claim that a defendant's counsel had rendered ineffective assistance of counsel in connection with a guilty plea, and set forth the rule that a defendant must allege and demonstrate "prejudice" arising from the derelictions of counsel, *i.e.*, "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 369-70 (footnote omitted). This is the rule which petitioner asserts the state appellate court was constitutionally compelled to apply in passing upon the merits of respondent's claim. Petition for Writ of Certiorari at 10-14.

The most fundamental flaw in petitioner's argument is that respondent never raised a claim of ineffective assistance of counsel in his post-conviction motion, but challenged the guilty plea only on the ground that it had been involuntarily entered (P.A. 25). Under Florida law, a post-conviction motion which challenges the effectiveness of counsel's assistance, to be legally sufficient, must specifically allege the following: (1) "the specific omission or overt act" upon the claim is based, (2) that the omission or act "was a substantial and serious deficiency measurably below that of competent counsel", and (3) that the deficiency caused substantial prejudice to the defendant. *Knight v. State*, 394 So.2d 997, 1001 (Fla. 1981).[4] Respondent's motion was thus wholly insufficient to raise an ineffectiveness-of-counsel claim under Florida law, inasmuch as it did not even assert the claim in the first instance (P.A. 25). On the other hand, the motion certainly did raise the claim that the guilty plea had been involuntarily entered, without a

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While the depiction of the prejudice standard in *Knight* varies to some degree from that enunciated by this Court in *Strickland v. Washington*, the Supreme Court of Florida has held that the two standards are co-extensive. *Jackson v. State*, 452 So.2d 533, 535 (Fla. 1984).

full understanding of the consequences thereof (P.A. 25).[5]

The Supreme Court of Florida has expressly held that an involuntary-plea claim is not to be reviewed under the standards applicable to an ineffectiveness-of-counsel claim. *LeDuc v. State*, 415 So.2d 721, 722-23 (Fla. 1982)(substantive challenge to guilty plea requires demonstration of "manifest injustice"; ineffectiveness-of-counsel challenge to guilty plea reviewable under *Knight* standard). Thus, the two claims are separate and distinct under Florida law, and *Hill v. Lockhart*, addressing as it did only the standard for review of an ineffective-assistance-of-counsel claim, is irrelevant to the issue presented to the state appellate court in this case.

It appears, then, that the heart of petitioner's argument is simply that the facts alleged in respondent's *pro se* motion did not address the issue decided by the state appellate court, and that the court, instead of holding the guilty plea unconstitutional under *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Williams v. State*, 316 So.2d 267 (Fla. 1975),[6] was somehow constitutionally required by *Hill v. Lockhart* to evaluate the claim as one challenging the effectiveness of trial counsel's assistance. Petition for Writ of Certiorari at 13-14.[7] The

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5

A motion for post-conviction relief is indisputably the proper vehicle for presenting this claim to the Florida courts. *E.g., Mikenas v. State*, 460 So.2d 359 (Fla. 1984); *State v. Wilson*, 395 So.2d 520 (Fla. 1981); *Robinson v. State*, 373 So.2d 898 (Fla. 1979).

6

Williams established the rules governing guilty-plea procedures in Florida, and held that an accused must be advised "that entry of a guilty plea constitutes a waiver of certain constitutional rights, specifically his right to remain silent, have a jury trial, have process to obtain witnesses on his behalf, and confront witnesses who are his accusers." 316 So.2d at 271.

7

Perhaps the reason that the court did not address *Hill* in its decision is that petitioner did not raise this argument in its brief on appeal; rather, petitioner argued, initially, only that the plea colloquy and satisfied "minimum due process standards", and that Florida procedural rules required respondent to demonstrate prejudice from any deficiency in the proceedings (R.A. 87-89). Petitioner first raised an argument based upon *Hill v. Lockhart* in its motion for rehearing (P.A. 13), at a time when the state court, under Florida law, was not required to consider the argument. *E.g., Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA 1986)("a party cannot (Cont'd)

premise of petitioner's argument in this regard is correct: respondent's motion seems to have been directed, at least in his statement of the facts underlying his claim, to a theory of overt coercion by state officers and a lack of enthusiasm on the part of his counsel (P.A. 25-26). However, the pertinent facts were brought before the state trial court by the parties, that is, the transcript of the plea proceedings was prepared and presented to the court, and facts pertinent to the colloquy were elicited from respondent at the hearing, largely through the efforts of the prosecutor on his cross-examination (R.A. 24-26, 48). And the power of the state appellate court to address the claim, once it was raised on respondent's appeal, is firmly established by state law.

Rule 3.850 of the Florida Rules of Criminal Procedure, in its original incarnation as Criminal Procedure Rule No. 1, was promulgated, in the wake of *Gideon v. Wainwright*, 372 U.S. 335 (1963), to supplant habeas corpus as the primary vehicle for post-conviction litigation in Florida. *Roy v. Wainwright*, 151 So.2d 825, 826-29 (Fla. 1963).[8] The Florida Supreme Court declared, immediately after its promulgation of the rule, that the "relief available" thereunder was to be "coextensive with that which would be available in habeas corpus." *Gideon v. Wainwright*, 153 So.2d 299, 300 (Fla. 1963). It was a hallmark of Florida habeas corpus law that *pro se* petitions were to be

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present arguments in a motion for rehearing that have not been presented to the court in the appellate briefs or oral argument").

8

Rule No. 1 was codified as Fla.R.Crim.P. 1.850 in the 1967 adoption of the Florida Rules of Criminal Procedure, without any substantive amendments to the original rule. *In re Florida Rules of Criminal Procedure*, 196 So.2d 124, 167-68 (Fla. 1967). The rule was renumbered as Rule 3.850 in 1971, again without any amendments. *In re Florida Rules of Criminal Procedure*, 253 So.2d 421 (Fla. 1971). In 1977, the Florida Supreme Court amended the rule to add certain procedural requirements for post-conviction motions. *The Florida Bar Re Rules of Criminal Procedure*, 343 So.2d 1247, 1264-65 (Fla. 1977). This version of the rule, which was in effect at the time of the post-conviction proceedings in this case, was more recently amended by the addition of a two-year limitations period and other procedural changes. *The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850)*, 460 So.2d 907 (Fla. 1984). However, the substance of the rule and the relief available under its provisions have remained the same from the time of its initial promulgation.

liberally construed, both in form and substance, *e.g. Sneed v. Mayo*, 66 So.2d 765, 870 (Fla. 1953); *Ex parte Amos*, 93 Fla. 5, 112 So. 289, 291-92 (1927), and this rule was held fully applicable under the newly-adopted post-conviction procedure in Rule No. 1:

> In processing a motion under Criminal Procedure Rule No. 1, it must always be borne in mind that such motions filed by a prisoner *pro se* should not be scrutinized for technical niceties, since a prisoner is almost always unskilled in the law and cannot be held to a high standard of pleading. . . . It must further be borne in mind that in order to effectuate the announced purposes of Criminal Procedure Rule No. 1 . . . the procedure and remedy so prescribed must be such that a prisoner may be afforded every procedural benefit available under habeas corpus and necessary to a meaningful investigation of his claim. The courts have the task, therefore, of adapting the procedure to the peculiarities and irregularities of motions which obviously state valid claims. Thus, as a matter of pleading, such motions should be treated with the same liberality as that historically granted by courts in entertaining applications for habeas corpus. . . .

Ashley v. State, 158 So.2d 530, 531-32 (Fla.App. 1963); *accord*, *Andrews v. State*, 160 So.2d 726 (Fla.App. 1964); *Sampson v. State*, 158 So.2d 771, 774 (Fla.App. 1963).

The Supreme Court of Florida has more recently re-affirmed this principle in *State v. Stacey*, 482 So.2d 1350 (Fla. 1985), stating that it was "not inclined to hold [an applicant] to professional standards of pleading", and that it was empowered to recast a claim where the merit thereof was patent on the face of the motion and supporting record. *Id.* at 1351-52; *see Nova v. State*, 439 So.2d 255, 259 (Fla.App. 1983)(inappropriate relief sought in *pro se* motion does not prevent court from granting proper relief on valid claim). This principle of Florida law was explicitly invoked by respondent in the state appellate court (R.A. 72-73), and the state court's subsequent decision to reach the merits of the claim raised on appeal was indisputably proper under this line of authority.

Thus, no constitutional question is presented by this ruling; neither *Hill v. Lockhart* nor any other decision of this Court prevented the state court from applying its own procedural rules and reaching the merits of respondent's claim. There is,

accordingly, no basis for the issuance of a writ of certiorari.

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1975

THE STATE OF FLORIDA,

Petitioner,

vs.

URBANO TORRES,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and Notice of Appearance have been served upon RICHARD E. DORAN, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128, counsel for petitioner, by depositing same in the United States mail, first class mail, postage prepaid, this 23rd day of June, 1986, and that all parties required to be served have been served this date.

Respectfully submitted,

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BY: Elliot H. Scherker

ELLIOT H. SCHERKER
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THE STATE OF FLORIDA,

Petitioner,

vs.

URBANO TORRES,

Respondent.

NOTICE OF APPEARANCE

The undersigned hereby enters his appearance as counsel for the respondent, Urbano Torres, in the above-styled cause.

Respectfully submitted,

BENNETT H. BRUMMER
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Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
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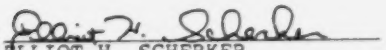
BY: 
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. ~~85-1975~~
85-1978

THE STATE OF FLORIDA,

Petitioner,

vs.

URBANO TORRES,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA, Plaintiff, vs. URBANO TORRES, Defendant.	CASE NO. 83-4248

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida 33125
February 6, 1984
Monday, 9:00 a.m.

The above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

BENNETT H. BRUMMER, Public Defender, by
JAMES EVANS, Assistant Public Defender
on behalf of the Defendant.

ALSO PRESENT:

MARY ROBERTS, Court Interpreter

MR. EVANS: James Evans, Public Defender, on behalf of the defendant, Urbano Torres, a/k/a Rafael Hernandez.

MR. NOVICK: Jay Novick, appearing on behalf of the State of Florida.

THE COURT: All right.

MR. EVANS: We are here on the defendant's rule 3 which states two allegations. The first allegation is that, one, the conviction was obtained by a plea of guilty which was not made voluntarily, with the understanding of the consequences of the plea and also, ground two, the conviction was obtained by the use of coerced confession.

THE COURT: All right.

MR. NOVICK: I am going to move to strike the second allegation in that we had a full evidentiary hearing on it which was supposed to have been transcribed. We are reordering or checking it now. It will obviously reflect you having heard the entire testimony and having heard the freeness and voluntariness, correct or incorrect. There was a full hearing on it.

MR. EVANS: Your Honor, at this point I don't know if he testified at that hearing, but he told me certain things that I believe at least would be a

basis of a prima facie case.

MR. NOVICK: Let's go through it all, do it once.

MR. EVANS: Am I the moving party?

MR. NOVICK: You are the moving party.

MR. EVANS: At this time I call the defendant to the witness stand.

THE COURT: Step forward, raise your right hand and be sworn, please.

(Thereupon, the interpreter, MARY ROBERTS, was duly sworn to faithfully translate all questions and all answers after which the defendant herein, URBANO TORRES, was duly sworn and testified through the interpreter as follows:

THE CLERK: State your name for the record.

THE INTERPRETER: I have already.

DIRECT EXAMINATION

BY MR. EVANS:

Q. Could you state your name?

A. (Through the interpreter) Urbano Torres.

Q. Are you the Urbano Torres that pled guilty to the crime of first degree murder in case number 83-4248?

A. Yes.

Q. What is your present status?

Are you serving a sentence now?

A. Yes.

Q. What was the crime you pled guilty to?

A. First degree homicide.

Q. Is it your understanding that your sentence would be a mandatory 25 years without parole?

A. That is what I had understood.

Q. Now, when you pled guilty, according to your affidavit, you stated in your affidavit that, first of all, the confession you gave was coerced; is that true?

A. That is the truth.

Q. Could you tell the Court what happened, that made you understand it was coerced?

What did the police tell you; what did they threaten you with?

A. The police threatened me. They tried to hit me and told me--showed me a photograph and said that that man knew me and going to accuse me for something else.

Q. Now, where was this at?

A. In the station with a detective.

Q. Do you happen to remember the detective's name?

A. No.

Q. Would you recognize this detective if you saw him?

A. Yes.

Q. Could it have been Detective Eloy Perez?

A. Yes, that one.

Q Now, did he threaten you with violence?

A. Yes.

Q. Could you be specific? What did he say and what did he do?

A. That he told me that if I did not declare that I was guilty, they were going to accuse me of being a homosexual.

Q Besides that, did he say anything else that forced you to give this confession?

A. He told me that if I came okay from them he was going to get an apartment for me.

Q Could you explain that answer a little bit more?

A. He was offering--making an offer to me. Well, he was trying to buy me that way.

Q Are you trying to say that he offered to find you an apartment if you pled guilty or confessed?

A. No, not that. First of all, they threatened me and then after that they were--well, as if they were trying to buy me.

Q I am mainly interested in the threats.

How did they threaten you? If they threatened you three different ways, tell me all three different ways and please be specific.

How were you threatened?

A. They tried to hit me and they showed me a photograph.

Q. First of all, stop. When he tried to hit you, did he actually swing at you and miss?

A. No. He didn't hit me, but he threatened me.

Q. Did he raise his hand?

A. Yes. He raised his hand at me .

Q. This is Detective Eloy Perez?

A. Eloy Perez, and the other one.

Q. Did both of them raise their hands or just one of them?

A. No. The other one was there with the tape recorder.

Q. Now, when Detective Perez raised his hand, what did he say to you?

A. Tell me the truth.

Q. Did he have anything in his hand when he raised it?

A. Yes. I think he had a cassette in his hand.

Q. Did you think he was going to hit you?

A. Yes.

Q. Were you scared?

A. Yes.

Q. What other type of threats did they make against you?

you?

A. Not any other one.

Q Now, you say promises were made to you if you confessed.

A. Yes.

Q. Was this Detective Perez again who promised you certain things?

A. The Detective Perez and the other one, his companion.

Q. Would that be Detective Alburnie (phonetic)?

A. Yes. A little guy.

Q Would you recognize him if you saw him?

A. Yes.

Q. What were they promising you to confess? What would they say they would give you if you confessed?

A. That they were going to find me an apartment because I had nowhere to live.

Q. Was it your understanding that if you confessed that you would not go to jail, is that what you are trying to say?

A. Yes.

Q. Is that the only reason you confessed to the police?

A. Yes.

Q. Let's talk about your lawyer that represented

you.

Now, in your affidavit you say that when you asked your attorney what you should do, you say he did not appear to be willing to use his full abilities to prevent a conviction and that seeing no possible way, you confessed, and that your attorney told you that you would possibly get the death penalty if you didn't confess and plead guilty. Are those the allegations that you are making against your former attorney?

A. Yes.

Q. Tell me what happened between you and the attorney, what he said, what you said and why you pled guilty.

A. About three or four--sometime--three or four days before I was sentenced, the attorney, the gentleman who was there, went to the cells there down below and he told me that they were asking the electric chair for me.

I told him that I was innocent, that, please, to do something for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said, yes. He said, why? That is because I have no family here and I was scared that my mother should find out that they had--that they had put me in the electric chair.

Q. Did your attorney tell you that he had talked to

the witnesses and prepared the case and talked to you about the testimony that would be given at a trial if you had one?

A. No.

Q. You said your attorney said he could not do anything for you?

A. Yes. Right here in that office (indicating).

Q. Are you sure you told him that you were innocent? Did you tell him that?

A. Yes.

Q. Now, why did you plead guilty to the Court through the lawyer?

Did you plead guilty because you were guilty or because of some other reason?

A. Because I'm scared.

Q. Was the reason that you gave the confession because you were scared?

A. Yes.

Q. Was the reason you pled guilty because you were scared?

A. Yes.

Q. How old are you?

A. I'm almost 20.

Q. Did you go to school?

A. Yes. I been to school here and in Cuba.

Q. What is the highest grade you completed in school?

A. Seventh grade.

Q Can you read?

A. A little.

Q You don't speak English; correct?

A. No.

Q You don't write English?

A. (Shakes head.)

Q You have to say the words.

A. No.

Q And the little reading you can do is in Spanish?

A. Yes.

Q Are you a good reader or a poor reader in Spanish?

A. I read poorly.

Q Do you write in Spanish?

A A little.

Q Are you a good writer in Spanish or a poor writer in Spanish?

A. No, not too good, but I can write.

Q How long have you been in America?

A. Four years.

Q Before that you lived in Cuba all of your life?

A. Yes.

Q Your attorney talked to you through an inter-

preter; correct?

A Yes.

Q During this conversation did you understand everything that was being said to you through the interpreter?

A Yes.

Q You have sworn to the allegations set forth in this motion that you filed; correct?

A Yes.

Q In this affidavit that you swore to you state, "Seeing no possible way to win in this situation, since his Court-appointed counsel did not"--

A Yes---

Q --conviction and given the threat to the police, the defendant unequivocally pled guilty."

Is that your allegation today in Court?

A Yes.

MR. EVANS That's it for me at this point.

THE COURT: Mr. Novick?

CROSS-EXAMINATION

BY MR. NOVICK:

Q Mr. Torres, when you were arrested here in Miami for this case, at that time you were on probation, weren't you, for an aggravated assault which was actually a murder in McArthur Park (phonetic) in Los Angeles, and

you knew that, right?

MR. EVANS: I object to that as being irrelevant.

THE COURT: Overruled.

Q (By Mr. Novick) You knew you were on probation to the Court in Los Angeles because you pled guilty out there to some kind of assault with a deadly weapon, which really led to the death of someone? You killed someone in McArthur Park in Los Angeles; right?

A Yes.

MR. EVANS: Objection. It is a compound question. I'm not sure he understands. He is saying he was on probation then. I think it is kind of unclear.

THE COURT: If you want to clarify it, you can.

Q (By Mr. Novick) Mr. Torres, you had several discussions with your Court-appointed attorney, Mr. Fields, before you even came to Court for that first hearing, that Monday, where your attorney asked the judge to throw out your confession? You talked to him, right?

A No.

Q You talked to him during that hearing, didn't you?

A If I talk to him?

Q During this hearing, when your attorney was asking the Judge that Monday to throw out your confession, remember?

A Yes.

Q And you had sitting with you at the table here your attorney and yourself, a man or a lady to translate, just like this nice lady today who is translating for you?

A A man.

Q So that you heard in Spanish everything that went on and you were able to communicate with your lawyer in your own language, in Spanish; right?

A Yes.

Q Now, your attorney told you through a translator, when he talked to you, that in America, in Florida, if you are convicted of first degree murder and you have another murder in your past, that that is one of the bad things that goes against you when the new judge here in Florida goes to sentence you; right?

A May I say something?

Q Sure.

A In the first place--in the first place, the case in Los Angeles, I am innocent. I plead guilty to get out of that and because they made an offer to me of five years.

Q Probation?

A Yes, he told me that.

Q That was one of his concerns as your lawyer, right, in trying to get the best deal that he could get for you?

MR. EVANS: Objection. He would have no knowledge of that.

THE COURT: Overruled.

A How could it be the best thing for me if I did not kill in Los Angeles and I did not kill here either?

Q (By Mr. Novick) But the paperwork says you agreed to plead guilty in Los Angeles in a case where a man got killed, right?

A Yes, but I only did it because of the probation, not because I did it.

Q No. I understand, but I was going to use all of that evidence and you knew it when I asked this judge to give you a sentence on this case. If a jury found you guilty, you knew I was going to use that, right?

A I knew because the lawyer told me they were going to bring witnesses from there.

Q From California?

A Yes.

Q You knew. Your lawyer, Mr. Fields, told you that in Florida, if you committed a murder and if you commit it when you're--in committing it, in doing the

murder or just right after the murder, you take some property from the person you kill, that makes it more serious for sentencing; although, like having a bad record, it's another bad thing that the judge would look at; you knew that, right?

A No.

Q Mr. Fields, he didn't tell you that?

A No.

Q Now, Mr. Fields, he talked to you about the way the guy who got killed in this case, in Florida, was all tied up. You knew about how he got killed, right?

A No. He showed me a photograph.

Q Yes. But before you came into Court you knew how that person died, right?

A No.

Q You saw the photograph before you came into Court?

A Yes.

Q So you saw how ugly it looked, right?

MR. EVANS: I'm going to object at this point. I think we are losing the relevant importance of this hearing. I don't know what it is leading to.

THE COURT: Overruled.

Q (By Mr. Novick) You can answer.

You saw from the pictures how gruesome and ugly

this murder was?

MR. EVANS: Your Honor, I object to the prosecution's characterizations. I haven't seen the pictures.

THE WITNESS: Yes.

MR. EVANS: And I might not consider them gruesome or ugly.

THE COURT: He is asking the witness.

Q (By Mr. Novick) Yes?

A Yes, I saw it.

Q And Mr. Fields, your lawyer, he told you when you were talking about this case that murders in Florida, if they are uglier than normal, that is another thing the Judge has to look at and if he finds that they are worse than normal and ugly, the way the crime happened, the way the murder took place, that he would sentence you harder for an ugly type murder?

Mr. Fields told you that, right?

A No.

Q But you remember Mr. Fields telling you that in his professional opinion, as a trained lawyer for a lot of years and knowing this particular judge very well, that there was a good chance that this judge might just sentence you to die in the electric chair; right? You knew that, right?

A Yes. That's what I was told.

Q By Mr. Fields, right?

A Yes.

Q He told you exactly why he thought so, right?

A No. He told me that it would be because of the case in Los Angeles and that he could give me more time because of the dead man, because of the way it was, the way he was.

Q Now, all the times when you spoke to Mr. Fields, either in court here or in back in that jury room or over at the jail, you always had a translator who is trained to translate, like this lady, for you, right?

A Yes.

Q Do you recognize the name Jose Solazano (phonetic)?

Would you recognize his name? That is the name of the translator.

A Yes. The day they sentence me.

Q That is the name of the translator, right?

A Yes.

Q So he was with you back in that jury room with Mr. Fields talking about what you were going to do in Court, what the Judge was going to do in Court, right?

A Yes.

Q So he would be a real good witness to tell us what you all talked about back there, right?

A Yes.

Q Let me ask you a few questions about this confession, okay?

When you first went down to the police station to talk to the detectives, you told them that you had never touched the telephone in the man's apartment, right? At first you told them that?

A Yes.

Q Then they showed you the fingerprints or told you about the fingerprint taken from the telephone that was positively identified as being yours; remember that?

A That was the way it was.

Q Then you finally gave this confession that you are now protesting?

A I am not protesting it. I am just saying the truth and saying what and how I feel.

Q Well, it was after they showed you this or told you about this fingerprint from the telephone that you told them what is in your confession?

A No. No. Before.

Q Oh, before?

A Before, yes. Before they showed it to me.

Q But they had told you they had it, right?

A No. No. No. Afterwards.

After I had given a confession saying that I

had not touched the telephone.

Q That you had not?

A And that the car had been loaned to me.

Q But before you gave the one which said that you didn't, before that, they told you before the fingerprints that they had from the telephone, right?

A Yes.

Q Now, let's go back to the first time that you were arrested.

Do you remember the car over at the bar, Pier 17; remember?

A Yes.

Q This is the car that you claim was loaned to you, right?

A Yes.

Q Do you remember the police finding in the trunk of that car the cord from the man's telephone, the man who got killed?

A No.

Q If I tell you that it was found in the trunk of that car, you don't doubt that, right?

MR. EVANS: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: I don't know.

Q (By Mr. Novick) When you were first booked into

the jail from that arrest at Pier 17 and then you got out for time served, right--

A Yes.

Q --when you were booked into the property room there, you had the dead man's watch. Do you remember that?

MR. EVANS: Objection, your Honor.

THE WITNESS: No.

THE COURT: He answered.

Q (By Mr. Novick) So if the evidence and the property sheets that they keep at the jail would indicate that you had the watch, that would be wrong?

A That was my watch.

Q Now, you testified under oath, in front of this judge, in the hearing, where your attorney, Mr. Fields, on that Monday, October 3rd of last year was trying to convince this judge that he should throw out and not accept your confession. You remember that, right?

A I don't remember.

Q Now, maybe you better mark it for purposes of this hearing.

THE CLERK: State's Exhibit 1-A, for purposes of Identification.

(Thereupon, the item referred to was marked as Plaintiff's Exhibit No. 1-A for Identification.)

MR. NOVICK: I won't be much longer, Judge.

Q (By Mr. Novick) If I were to show you State's Exhibit 1-A for the purposes of Identification, which is the motion to throw out your confession, where it lists my name and Mr. Fields' and the Court Reporter and all of the witnesses that I called on the back, that you were called and sworn in and you did testify as a witness, this would also be wrong; right?

MR. EVANS: Your Honor, I would object to it.

THE COURT: Overruled.

A I don't know because I don't understand anything of that. I don't know anything about that.

MR. NOVICK: I would move it into evidence and ask the Court to take judicial notice of its own records.

THE COURT: All right.

THE CLERK: State's Exhibit 1-A for Identification becomes State's Exhibit No. 1.

(Thereupon, the item referred to was marked as Plaintiff's Exhibit No. 1 and received in Evidence.)

Q (By Mr. Novick) Mr. Torres, as far as the throwing out of your confession goes, we have already heard all this in Court, haven't we? And the Judge already rejected it, did not accept it when he first heard it.

MR. EVANS: I would object to that as being irrelevant.

THE COURT: I will sustain it based on the matters before the Court and the record.

MR. NOVICK: At this time, your Honor, I am going to ask that when it is typed up, that the hearing and the motion to suppress be marked, moved into evidence as recorded by her and reflect for you exactly what did take place in Court, what you heard. You can review it and refresh your recollection. Do you have any objection to that?

That will be Exhibit No. 2, the transcript on the motion to suppress to be received.

Q (By Mr. Novick) Now, do you remember the Judge ruling against throwing out the confession late one Monday afternoon? It was actually, really, pretty early in the evening. It was getting late that Monday, back on October 3rd, about 6:00 at night, 7:00 at night?

A I don't remember.

Q You don't remember when the Judge told Mr. Fields, your lawyer, that he was not going to throw out the confession?

A No. I don't remember.

Q Well, do you remember that Monday of the trial week that we recessed, we left Court that Monday evening in order to give your lawyer, Mr. Fields, some time, either that night or the next morning to speak to you about your

case again and you came back on a Tuesday?

A Yes.

Q Did you speak with Mr. Fields that night, that Monday night, at the jail?

A At night, no.

Q But you did speak with him for a long period of time, with Mr. Solazano, the interpreter, in the jury room?

A Yes, on Tuesday. Yes.

Q Now, after you spoke to Mr. Fields with the interpreter on Tuesday, you came out in front of the Court, this Judge right here, right?

A Yes.

Q With the Court interpreter, right, Mr. Solazano?

A Uh hmm.

Q And the Judge asked you a lot of questions, right?

A To me? No. To the lawyer. I didn't speak that day.

Q You didn't speak that day at all?

A I spoke when I did this with my hand (indicating).

Q When you took the oath, you talked and you talked no more?

A No. No.

Q Do you remember the judge, this man here, asking you whether or not you wanted to plead guilty?

A I remember that he asked me, but I plead guilty because the lawyer had told me that if I didn't they were going to give me the electric chair.

Q I want to go down the questions with you, though, Mr. Torres.

You do remember him asking you if you wanted to plead guilty?

A Yes.

Q And your answer, at least on that Tuesday, was yes?

A Yes.

Q And you were under oath to tell the truth, right?

A Yes. I swore there. I put my hand up and no more.

Q And there was a clerk of the court who swore you to tell the truth, but it was the other one that alternates. She was a white clerk, a white lady and she swore you to tell the truth?

A Yes. Yes.

Q And the judge asked you for your age and a little bit about your educational background, right?

A Yes.

Q He asked you whether you were taking any drugs or had anything wrong with your head, right?

A Yes. I think so. Yes.

Q Any mental problems?

A (no audible response)

Q He asked you whether you understood, if you did plead guilty, that this was an agreement, a deal, which your attorney had worked out with me to save you from the electric chair and that you would have to spend at least 25 years in jail; the Judge asked you whether you understood what you were going to have to do. Do you remember that?

A Yes. I remember.

Q And you remember the judge because Mr. Fields was appointed by the Court to help you out. You remember the judge asking you whether or not everything he did was okay with you, you were satisfied with him and you said, yes, it was okay with you?

A No. I don't remember.

Q Now, do you remember that somewhere during this discussion between you and the judge there was something along there that you didn't quite understand and we broke, we took a little bit of a break for a minute and you spoke to Mr. Fields again with the translator; do you remember, to clear some things up?

A I don't remember what confusion there was.

Q Do you remember that?

A I don't remember what confusion there was.

Q But the judge gave you time to talk with your lawyer, right?

A The lawyer spoke to me. The lawyer spoke to me and said that I had promised him that I was going to plead guilty and why did I plead guilty. And why did I plead guilty? Because I was scared and because he told me that they were going to give me the electric chair.

MR. NOVICK: I don't have any further questions at this time.

I would move into evidence, when it comes up, because it should be in the Court file, the transcript of the plea colloquy and ask that this becomes State's Exhibit No. 3, as soon as it is received by the Clerk.

You do not have any problem with that, Mr. Evans?

MR. EVANS: No problem.

REDIRECT EXAMINATION

BY MR. EVANS:

Q Mr. Torres, when you were before the Judge with Mr. Fields and they were asking the questions before you pled guilty, did you understand everything that was said to you?

A A little.

Q So you did not understand all of it; correct?

A No.

Q Now, was the interpreter--he wasn't your friend, was he?

A No.

Q He was not someone that you were supposed to confide in; correct, like your attorney?

A Yes.

Q And you confessed and you pled guilty because you were scared and that is the only reason you pled guilty; is that true?

A Yes. Yes.

Q Now, the case in California, you did not plead guilty to murder, did you?

A No.

MR. EVANS: That's all, Judge.

MR. NOVICK: No recross.

THE COURT: Thank you.

MR. EVANS: Your Honor, at this point the defendant's allegations are still that he was threatened, possibly with force, by the police. He doesn't remember the plea colloquy, what was all said to him, but he remembers that he pled guilty because he was scared, and under his

belief, Mr. Fields didn't do all he thought he should have done for him or he didn't have any confidence in him. He thought that if he didn't plead guilty that he would get the electric chair and he said he plead guilty just to save his life.

I don't think anything has come up that would rebut that. That's the point we stand on right now.

MR. NOVICK: Are you resting your case?

MR. EVANS: I'm resting my case.

MR. NOVICK: May I call my first witness?

THE COURT: Yes.

MR. NOVICK: Harold Fields.

THE CLERK: May I swear you in, Mr. Fields?

Thereupon:

HAROLD FIELDS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NOVICK:

Q Would you state your name and occupation?

A Harold Fields. I'm an attorney.

Q How long have you been an attorney?

Just for the record, tell the Court your background.

A I've been an attorney since March 20, 1973,

when I was sworn into the New York Bar.

Q And a majority of your practice has been over the course of those years criminal defense?

A Yes, sir.

Q You have done numerous first degree murder cases, Mr. Fields?

A Yes.

Q Were you the attorney, in fact, of record, for Mr. Urbano Torres?

A Yes.

Q In your preparation of this particular case, you took depositions; correct?

A Yes.

Q You did some traveling for which some depositions took place and didn't take place, but to look into the background of your client?

A Yes.

Q And to see whether the State could prove the allegations in the indictment and some of those aggravated factors that the State would use against your client at time of sentencing?

A Yes.

Q Did you have occasion during the time you represented your client to meet with him on more than one occasion?

A Yes.

Q Did you indicate to him the proof which you felt the State would be able to go forward with in this case, both as to the first degree murder and as to the sentencing phase, if it were to get that far?

A Yes.

Q Did you indicate to your client, as a trained professional, what you thought the outcome in this case could potentially be?

A Potentially yes.

Q Did you indicate to him the orders in this-- did you indicate to him that there were some serious aggravating circumstances in this case which would mitigate against him, as far as sentencing goes, and that this was really a potential death case?

A There were two.

MR. EVANS: At this time, I am going to object. Mr. Novick is testifying.

MR. NOVICK: I will do it in a non-leading fashion. I was trying to push a little bit.

Q (By Mr. Novick) Did you file motions in this case?

A Yes.

Q Did you file standard death motions in a death case asking for all kinds of rulings by the Court on death

penalty issues and asking for aggravating and mitigating circumstances, and the Public Defender's office asked for those types of things in order for you to protect your client in the eventuality the State was looking for that type of punishment in a case?

A I filed a number of motions that were appropriate to a death case, yes.

Q Did you also file a motion to suppress the defendant's confession in this case?

A I believe I did.

Q Did that in fact get to hearing?

A Yes, it did.

Q Did you meet with a client at that time and about that motion?

A Yes.

Q Let me ask you this: You don't speak Spanish, right?

A No.

Q When you met him, you met him with or without a certified Court interpreter?

A Well, every time I met with him, it was with a certified Court interpreter.

Q There was a hearing on the motion to suppress, correct?

A Yes, there was.

Q And the Judge ruled?

A Against me.

Q Then there was a plea offer from the State at that point?

A There had been a plea offer all along. There had been an original plea offer, I believe.

Q What happened to that?

A Well, that plea offer went down the drain after you had determined that he had committed a homicide in Los Angeles and you were able to prove it.

Q Then the pending plea offer was to what?

A The plea offer?

icer?

Q The new pending plea offer, after I withdrew the second degree plea because of the aggravated circumstances of the murder in Los Angeles.

A You said you were going to ask for the death penalty, notwithstanding--notwithstanding your previous plea offer.

Q Okay.

Now, do you remember us recessing that Monday night?

A After the motion to suppress?

Q After the motion to suppress.

A Yes.

Q Do you remember having conversation with your

client in the jury room here in Judge Person's court, Tuesday morning, before and during the Court calendar?

A Yes.

Q Do you remember the plea dialogue?

A Colloquy here in front of the Judge?

Q Yes.

Did Judge Person go through the standard set of required questions as prescribed by the Florida Rules of Criminal Procedure?

A As I recall. You hear it so much that---

Q You might have left something out and the record would speak for itself?

A The record would speak for itself.

Q Did your client ever communicate to you on that day that you were forcing him to do something that he did not want to do?

A No. You know, he was upset.

not???? Q That he would have to plead guilty to this type of crime?

A Yes.

Q Did you ever threaten him?

A Threaten him? How do you mean?

Q You just wouldn't try this case or couldn't try this case?

A No. I never told---

Q That you would not give him a vigorous defense if he decided not to accept the plea offer?

A No. I never told him that.

Q Did you ever tell him that the State Attorney's office or myself, someone had a pipeline to the Judge and the Judge was going to do "X" if he was convicted?

A No. I didn't tell him that either.

Q None of that would be true, right, to your knowledge?

A That the State Attorney has a pipeline to the Judge?

Q Or this State Attorney or the State Attorney's office or anyone knew what the Judge was going to do in this case?

A No. I don't think you have a pipeline to this Judge.

Q Or any other Judge.

In fact, do you remember whether there was ever any conversation in front of this Judge about his thoughts prior to sentencing, prior to us going into the hearing and this case pleading out?

A I believe that--the record will have to speak for itself, but I believe the Judge had indicated that this was a horrendous type crime and the fact that he had pled guilty to a crime in California certainly didn't help the

issue. I believe it was whether or not he was going to be able to get behind the crime in bringing me circumstances--since the crime was only aggravated assault, and I got an indication it would be resolved against me.

Q Your client pled guilty to aggravated assault where, in fact, someone died. This was a plea taken in California. The State was going to be able to introduce evidence that there was a death there. You resolved that or the Court resolved that in your mind against you?

A Yes.

Q If the record so reflects, your client was able to take the stand in the motion to suppress and voice his feelings on the matter?

A I do not recall exactly what my client--exactly what he said, but I believe I asked one question too many and my client kind of closed the door on the motion to suppress, as I recall.

Q He gave an answer to something---

A Totally inappropriate.

Q Totally contrary to what was testified to today, but the record will reflect---

A I know it was totally contrary to what was said today. It was certainly contrary to my theory of defense.

MR. NOVICK: I don't have any further questions.

CROSS-EXAMINATION

BY MR. EVANS:

Q Mr. Fields, you don't speak Spanish, do you?

A I understand some Spanish. I've had a number of years in college, but I don't speak and understand it fluently, no.

Q Did you try to use a little Spanish, you know, in trying to communicate with Mr. Torres?

A I don't think so. I may have said some things to him between--exactly between me and him, without the interpreter, but it was--it was--it was not of substance.

Q Now, at the time of the plea colloquy he was upset, correct?

A Yes.

Q Did you know why he was upset?

A No. He didn't want to go to jail for 25 years.

Q Did he tell you that or did you assume that?

A Well, the night before--I think you have to set it up a little bit.

The night before, after he had testified, we went into the jury room with the interpreter and I asked him what he wanted to do. He said, "I want to plead guilty." He had heard the evidence from the witness stand. He had heard Detective Perez, I believe, give a description of the homicide and I think that he--he had

felt at that time that the plea negotiations were in his best interest.

Q Now, did you ever tell him, I can't do anything for you?

A No.

Q Are you sure?

A Yes.

Q You could have said it and forgotten about it?

A Well, what do you mean, I can't do anything for you? Can I win the case?

It was my opinion that I couldn't win the case, and, you know, I certainly could have told him that.

Q Did he tell you he was innocent?

A Yes.

Q Now, he pled guilty to aggravated assault in California, correct?

A Yes.

Q Normally, aggravated assault, just pointing the weapon at someone, is a third degree felony?

A Yes.

Q Based on your investigation, did someone stay in California based on that same case?

A Yes.

Q Could you tell me the circumstances?

A Circumstances, as best I can recall, was that

another individual and the victim had gotten in a fight and apparently the other individual turned to Mr. Torres and Mr. Torres, at least according to the people in California, stabbed the man to death, okay?

Apparently, for whatever reason, the police out there weren't able to get their witnesses together in time--in time. I believe one of the people who told on him was a police informant and that was something that I had figured out by myself, something Mr. Novick knew and hadn't told me. I figured it out, looking through the Court documents and through the police reports, and he had disappeared. But it hadn't been indicated to me at the time that we had gone to California that the police had--had found him again--

Q And based on that--

A --and that person is available.

Q --you went to California, correct?

A Yes.

Q And you talked to these witnesses that gave you the basis for---

A No. I didn't talk to the police informant. No. I talked to the police officer responsible for the case.

Q Were they willing to come to Florida to testify in this case if they had to?

A Yes.

Q Did Mr. Torres, in your opinion, seem to have diminished capacity in any mental sense, based on your observations of him?

A I don't think he had a real good education and, to tell you the truth, I don't believe that--Detective Perez didn't trick him or promise him anything to make a confession, or didn't.

Q Did you have any physical proof? Did the State prove to your satisfaction that the watch in the property was the deceased's watch?

A Well, they tried to. They tried to establish it and the objection was that there was no one to say this was the man's watch, except a description that somebody else had given of the watch. I believe the objection was sustained and the watch wasn't used as a basis.

Q So the watch didn't have a serious---

A No.

Q The State was not able to establish, to my satisfaction, or the Court's satisfaction that this was in fact the deceased's watch?

A Yes.

Q Mr. Fields, do you feel that Mr. Torres pled guilty because you forced him to plead guilty by telling him that he would get the electric chair if he didn't plead

guilty?

A I'm not going to speculate on that. I believe Mr. Torres pled guilty because he believed it was in his best interest, as I did.

Q Do you believe the case--the State had a good enough case to get a conviction for first degree murder?

A Yes, they did.

MR. EVANS: Nothing further.

MR. NOVICK: Nothing further from me.

Thank you very much.

THE CLERK: Raise your right hand, please.

Thereupon:

JOSE SOLAZANO

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NOVICK:

Q Could you tell us your name and occupation?

A Yes, sir. My full name is Jose Solazano and my occupation is Official Court Interpreter for Dade County Courts.

Q Did you have occasion to be brought in by the Court to the case of State of Florida versus Urbano Torres, this man who is--maybe you can't see him--this man's case right here, in this courtroom on Tuesday morning, October 4,

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A I have no unaided recollection of that incident and I might add the reason. We have so many cases every day.

Q Do you remember, though, talking and translating with Harold Fields, the gentleman who just came out and asked you to come into the courtroom and aided him in discussing a case in this courtroom and in that jury room with a particular defendant, though you may not remember the defendant that the case revolved around, the case where somebody's car was stolen and he was wrapped up and tied up in some sheets and there was some bowel movement when he was killed, kind of---

A With a car?

Q No. Where the guy was tied up with sheets. He had a bowel movement--does those set of facts---

A I recall something like that, but I believe that when I heard those details, it would not have been in the jury room. It might have been another---

Q Tell me who the translator was that day.

A I may have had more than one intervention in the case.

Q If the record of the plea colloquy, when it is provided to the Court, reflects that you were the translator that morning, that wouldn't surprise you,

would it?

A No, it wouldn't.

Q Let me ask you this: Were you with Mr. Fields on that particular case, the one that you remember with the sheets and the body secretions?

A Yes.

Q Do you remember discussing with Mr. Fields or translating for him an attempt at plea discussions?

MR. EVANS: Your Honor, at this point, if he can't establish that this defendant--it's a moot question.

THE COURT: We are going to have to try to do the best we can here. Let's see what he remembers, if anything.

Q (By Mr. Novick) Do you remember having the plea discussions?

A Not that case specifically. If the Court record shows it--but I have---

MR. NOVICK: I have a suggestion, Judge, at this time. The man does obviously have a lot of cases, a lot of pleas in Court. If I could wait until we get the plea colloquy, let him refresh his recollection and see whether or not he was the official translator, I will hold him off until that comes in. It might be easier that way.

THE COURT: I think it would be fairer to all people involved if we just hold off on it. Also, we order this again today. That will be the third and the fourth.

MR. NOVICK: I have personally ordered it, not only in the courtroom, but from my office and I know I just can't imagine the plea from October not in the Court file yet. Maybe we ought to get a reset date and I would be resting after Mr. Solazano's testimony, once we get a chance to review it.

THE COURT: Was it---

MR. NOVICK: He is going to find I have a notation from the time---

THE COURT: Was the confession transcribed in this case? I don't remember.

MR. NOVICK: Yes, it was. If the Court would like this as well to aid you, I will move that into evidence.

THE COURT: I have a recollection of two cases.

MR. NOVICK: I move that into evidence as State's Exhibit No. 2, the confession itself, and I will also white out Mr. Evans because he didn't have the main file. So we will have two copies, one for him to review and one for the Court to review, to refresh the recollection, because you did

rite?

look at it and review it.

I'd like to leave this hearing until that time. Maybe we can---

THE COURT: He's not going anywhere. Put it over--give it at least two weeks.

THE WITNESS: If there were any specific questions, I might be able to answer.

MR. NOVICK: It is not that long. Until you've had a chance to recollect that you were the person on the plea---

THE COURT: Okay.

MR. NOVICK: Pick a date out.

THE COURT: Yes. We can pick one--two weeks from now. The 21st would be so busy. Let's do it the Friday before. I really want it on so that those documents appear. Get me a copy of everything so that we can--I can read it. Then I'll have future hearings. 2/17.

MR. EVANS: 2/17 report?

MR. NOVICK: May I be excused?

THE COURT: Yes, sir. Thank you.

MR. EVANS: Thank you.

(Thereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing is a true and correct record of proceedings had in the case of State of Florida versus Urbano Torres, Case No. 84-4382 before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 30th day of December, 1984.

CONCETTA GILLIAND
Shorthand Reporter

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

URBANO TORRES,

Defendant.

CASE NO. 83-4248

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida 33125
March 16, 1984
Friday, 10:00 a.m.

Thereupon, the above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

BENNETT H. BRUMMER, Public Defender, by
JAMES EVANS, Assistant Public Defender
on behalf of the Defendant.

THE COURT: All right, we are here in the matter of Urbano Torres.

MR. NOVICK: Judge, as we recessed the last time--Jay Novick. This case was on for hearing. We recessed for two other pieces of State's evidence to be produced for your review, and that is the entire transcript of the motion to suppress heard by you on October 3, 1983, which has not been transcribed and introduced into evidence as State's Exhibit No. 2; but I don't believe the Court has had an opportunity--

THE COURT: I have got a copy of that, I think, in my office.

MR. NOVICK: You very well might, because I really don't know what's in the office and also to wait for a copy of the plea colloquy, which I did provide to the Court, which is State's Exhibit No. 3, which is now being received and with the receipt of those two pieces of additional evidence to negate the defendant's claims filed in his pro se motion for post-conviction relief.

The State would rest its rebuttal of the defense's claim and unless Mr. Evans has some further evidence to produce, we could proceed either to argument or to having the Court review that or have the Court review it--whatever the Court wants and Mr. Evans wants.

MR. EVANS: I have already presented what I would

like to present, and I would just have argument.

THE COURT: All right.

I'm ready to hear argument then.

I think I have got a copy of this in the office.

MR. NOVICK: I have tried, as these things have come up, to provide not only the original to the Clerk, but to give you a copy; and I think we have done so as things have come in.

MR. EVANS: Your Honor, the defendant has testified, and I am sure the Court remembers his testimony.

Basically, his testimony was that he has very little education. He is from Cuba. He doesn't have a high degree of understanding of English, and the understanding that he has in Spanish is of a very limited nature.

He says that he pled guilty, because he was told he would die in the electric chair. He felt that he did not understand everything that was going on. He felt that he confessed, because he had no chance or no choice to go otherwise, because in his opinion, his lawyer wasn't doing anything for him in his estimation or to his understanding; and he felt that with his lawyer not working for him, rather than go for the-- and possibly be killed for something which he considers he didn't do, he would rather plead guilty on that

basis.

Now, the State has provided the Court with a copy of a statement that is--that was witnessed by a Gus Cueva (phonetic), which is approximately--well, it's not numbered, but it seems to be about 10 or 12 pages long; and even from this, your Honor, it's not clear that the defendant understood everything that was going on.

You will note that the questions were basically leading. For instance, on--I guess this is page two, it says, "I have not been threatened nor have they promised me anything. Nobody has given me a hard time nor have they promised me anything to make me sign the paper. I also want to explain to you, you know, that at this time, you are not under duress."

Basically, this is the officer speaking saying all the things that he could have said or if he said it, you could say that this was a clearly knowing and intelligent waiver. His responses are, "Uh huh."

And then the next one is, "You know that you don't have to be here if you don't want to," and then he says, "Hmmm," but you want to clarify the problem, so there won't be any other problem.

I would say basically that this vehicle that the State says is a trick that the police used to get

him to confess. They led him throughout all the--
understanding his answers, that he understood even on
that same page.

It says, "If you want to leave, you can leave.
If you want to stay, you can stay," and that's in my
questions.

Then it's unintelligible or whatever that is. It's
not clear, your Honor. I would say Mr. Torres is maybe
of limited intelligence. He is in a new country with a
new system. He felt alienated. He felt that he had to
do what he thought to save his life, and he only made
those statements and pled guilty, because he thought
that if he didn't, he would surely die by electrocution
for something that he surely didn't do. That's basically
my argument.

THE COURT: All right.

MR. NOVICK: My argument in rebuttal is about
three sentences, Judge.

One, the argument that Mr. Evans makes as to the
motion to suppress is not well founded in a Rule 3,
Judge. That has been heard and ruled on, and that may
only be reviewed by a direct appeal from the Court's
ruling.

There could have been a plea, for example, research-
ing the right to appeal that particular ruling if that

was all the evidence the State had to introduce against him, but that's not reviewable by a Rule 3, and I think the transcript of that hearing that you have in front of you will indicate to the Court and the Appellate Courts that this defendant received a full, fair and complete hearing at the appropriate time on his motion to suppress.

His only other allegation in his pro se motion for post-conviction relief is that Mr. Fields coerced him into a plea.

The Court heard the evidence from Mr. Fields. Can't weigh that against the facts in front of you. Your plea colloquy, you having observed that plea colloquy, you remembering the questions and your answers to the defendant, because during the course of this hearing, you recall some of the things that you said to him, the case came back to you, and some of your impressions as the trial judge of what your feelings were when this plea was entered as to the potential sentence here, and it's a very classic case of a plea of convience.

The Court indicated some of the things that the Court would consider, and the jury would consider upon sentencing, should there be a guilty verdict.

Mr. Fields had alerted the defendant of that, as

he had the obligation to do; and very classically, the defendant felt, rather than risking the potential death penalty in this case, which the Court had indicated was a real possibility here for someone to have killed someone out in L.A. and come back here a short period of time being on probation and killing someone here locally, that instead of risking that, he took the classic way out and pled guilty to what the Court approved of, a fair plea in this particular case in return for not taking that risk.

And there is no indication by testimony, really either by the defendant or by Mr. Fields or by the record in front of you that there was any coercion here. This was really a person, a young man who was frightened. I think everyone who comes in front of the Court in such a situation, is going to be frightened.

The question is did he do what he did intelligently, because he had a reason for it? I think the record is clear that he did it to save his life at that point.

THE COURT: All right.

MR. EVANS: Can I say something briefly?

MR. NOVICK: I have no objections.

MR. EVANS: I would ask the Court to consider the confession, because part of his Rule 3 motion was conviction obtained by use of a coerced confession, and

I don't think that's relevant to why he pled guilty.

The fact that he has this alleged confession and it's part of the--I would ask you to consider that as one of the circumstances under the totality of the circumstances.

THE COURT: All right.

The Court doesn't need to read this page for page. I just wanted to make sure we had this hearing, and the length of the hearing that we had, I do have some recollection of that.

Since I was provided at the suppression hearing, I don't think it's necessary for me to now reread all of this and state for the record that I have read it. It will become a part of the record in this matter along with our other documents that have been marked as evidence in this case, and the Court at this time is prepared to rule on the defendant's Rule 3, and the Court's going to deny the relief that's requested at this time.

MR. NOVICK: I think the defendant needs to be advised, I think he has the right to appeal the denial of your Rule 3 within 30 days of the entry of that order and the public defender, because he is indigent, will be appointed to do that.

MR. EVANS: Would you appoint us?

THE COURT: I am going to appoint you and make sure Mr. Torres understands that I have denied his request, and that you may have 30 days to appeal the ruling of this Court on the denial of your motion.

MR. EVANS: Thank you, your Honor.

MR. NOVICK: Thank you, your Honor.

THE COURT: Do we have all of the appropriate documents marked for evidence from this hearing?

MR. NOVICK: Yes, we do.

THE COURT: The transcript, the plea colloquy?

MR. NOVICK: What we need to do, I think, though it might be a little bit more complete, Judge, is if we--since there were three statements, the Court has some good memory of the case, the Court re-alerted me to the fact there were three, and they should be---

THE COURT: Advice of rights form in Spanish and in English translation with them .

MR. NOVICK: They have not been made a part of the hearing on the Rule 3, Judge. They are part of the hearing on the motion to suppress, but if the Court would have no objection, so that the record is absolutely clear, including as evidence all three--

THE COURT: I feel they ought to be included, all documents that I had and considering I did have a copy of that. In fact, I have them in front of me now,

and the Statements, as a matter of fact--

MR. NOVICK: To make it easier on your Clerk, then; because she was not here at this time, why don't we just have marked at this time, the rights form as the next consequtive State or Court exhibit.

THE COURT: Mark it for the Rule 3.

THE CLERK: State's Exhibit No. 5.

MR. NOVICK: The original transcript where the defendant denied his involvement.

THE CLERK: State's Exhibit No. 6.

MR. NOVICK: And the final confession where when confronted with the fingerprint evidence off the phone, he finally admitted his involvement.

THE CLERK: State's Exhibit No. 7.

MR. NOVICK: May we be excused?

THE COURT: Yes. We are in recess.

(Thereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing pages 1 through 10 are a true and correct record of proceedings had in the case of State of Florida versus Urbana Torres, Case No. 83-4248, before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 23 day of April, 1984.

Carla DeLaughter

CARLA DeLAUGHTER
Shorthand Reporter

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA

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CASE NO. 84-793

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APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

INTRODUCTION

The appellant, Urbano Torres, was the defendant in the trial court and the appellee, the State of Florida, was the prosecution. In this brief, the appellant will be referred to as defendant and the appellee as the state.

The symbol "R" will be utilized to designate the record on appeal, the symbol "Tr" the transcript of proceedings included in the record, and the symbol "S.R." the supplemental record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

An indictment charging defendant with first-degree murder and robbery was filed on March 10, 1983 (R. 1-2A). On October 4, 1983, defendant entered a guilty plea to the charges, and the trial court entered judgment and imposed concurrent terms of life and 15 years of imprisonment (R. 43-47).

Defendant filed a motion for post-conviction relief on November 8, 1983 (R. 117-23). The trial court conducted an evidentiary hearing on February 6, 1984 (R. 117-18; S.R. 1-45). An order denying the motion was entered on March 16, 1984 (R. 249). Notice of appeal was filed on April 5, 1984 (R. 255).

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHERE THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH THAT DEFENDANT HAD KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHTS TO A TRIAL BY JURY, CONFRONTATION OF ADVERSE WITNESSES, AND COMPULSORY PROCESS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, IN THE ENTRY OF HIS GUILTY PLEA TO THE CHARGES IN THIS CASE.

STATEMENT OF THE FACTS

Defendant was arrested on February 20, 1983, on charges of first-degree murder and robbery (R. 3). The Public Defender was appointed to represent defendant at a first-appearance hearing on February 21, 1983 (R. 4). A grand jury indictment charging defendant with first-degree murder and robbery was filed on March

10, 1983 (R. 1-2A).

The trial court appointed Harold T. Fields as a special assistant public defender on June 7, 1983 (R. 116). Mr. Fields thereafter filed several motions to suppress physical and testimonial evidence (R. 9-13, 127), which were heard by the court on October 3, 1983 (R. 127-27A, 128-96).[1] Prior to taking testimony on the motions, the court inquired regarding the status of any plea negotiations, and was advised by the parties that the state had offered to agree to a life sentence on the murder charge if defendant were to enter a guilty plea, but that a death sentence would be sought if the case proceeded to trial and resulted in a first-degree murder conviction (R. 138-41). The court thereafter heard testimony on the motions to suppress (R. 141-86), and denied the motions at the conclusion of the hearing (R. 193-94). The court stated that jury selection would commence on the following morning (R. 194).

At the commencement of the proceedings on the next morning, October 4, 1983, the prosecutor announced that the parties had negotiated a guilty plea to first-degree murder and had agreed upon a sentence of life imprisonment for that offense, with a concurrent sentence on the robbery count left to the court's discretion (R. 199). Defendant was then sworn, as was an interpreter to translate the proceedings for him (R. 199), and

---

1 Included in the record on appeal is Mr. Field's affidavit in support of his motion for attorney fees, which motion details his preparation of the case between the date of his appointment and the hearing (R. 112-14).

the following then transpired:

> The Court: All right.
> Mr. Torres, please state your name, for the record.
> The Defendant: . . . Urbano Torres.
> The Court: How old are you, please?
> The Defendant: Twenty years.
> The Court: Mr. Torres, are you aware of the charges against you?
> The Defendant: Yes, I am.
> The Court: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that the State was seeking the death penalty in your case as you are well aware.
> Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already [resolved] by the Court against you, and your [sic] electing, at this point, to enter a plea after having fought the case up to this point; is that correct?
> You're entering this plea of guilty; is that correct?

(R. 200).

Defendant did not respond to this question, and counsel requested and was afforded opportunity to speak with him (R. 200). Thereafter, the following transpired:

> Mr. Novick [assistant state attorney]: Judge, back on Urbano Torres' case.
> The Court: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court if we were to, but which we are not having a trial.
> You are stipulating to a prima facie case of guilt here and need --
> Mr. Novick: I would ask the Court to [rely] on what we heard yesterday.
> The Court: I think we did hear during the suppression, no objection utilates [sic] those factors; [for] the purpose of finding a prima facie case of guilt.

> The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be five good aggravating -- one of which is involvement in the other similar type of case in the past. . . . But there was a death involved; was there not?
>
> Mr. Novick: Correct. Wasn't similar. In fact there was in Los Angeles.
>
> The Court: Mr. Torres, under the circumstances, is this what you are going to do?
>
> The Defendant: Yes.

(R. 200-02).

The court then inquired of counsel, who agreed that he was satisfied that defendant understood "the nature of this and appreciate[d] the consequences of his guilty plea" (R. 202), after which the court imposed sentence:

> The Court: All right.
>
> The Court at this time, based upon the stipulated facts during the suppression hearing, the Court finds that you are doing this freely and voluntarily.
>
> Mr. Torres has been represented by a competent attorney and the Court will find the facts which the State would be prepared to prove and which [are] admitted by your plea of guilt[y] would be sufficient to sustain the finding of guilty by the trier of fact.
>
> All right. Judgment [and] sentence -- the Court as to count one, the Court will sentence you to a term of life imprisonment.
>
> Count two, being a concurrent 15 and pursuant to the statute, 25 year minimum mandatory. . . .

(R. 202).

Defendant filed a motion for post-conviction relief approximately one month after this proceeding, on November 8, 1983 (R. 117-23). The motion alleged in pertinent part that the conviction had been "obtained by [a] plea of guilty which was not

made voluntarily with the understanding of the consequences of the plea." (R. 121).[2] The court afforded defendant an evidentiary hearing on the motion on February 6, 1984 (R. 117).

Defendant testified that he is 20 years of age, that he had come to the United States from Cuba four years earlier, that he had completed the seventh grade in Cuba, and that he can neither speak nor write in English (S.R. 9-10).[3] Defendant described his conversation with Mr. Fields prior to the guilty plea proceedings as follows:

> [T]hree or four days before I was sentenced, the attorney . . . went to the cells there down below and he told me that they were asking the electric chair for me.
>
> I told him that I was innocent, that, please, to do something for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I

---

2 The motion alleged, as facts in support of this claim, the following:

> Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

(R. 121). The motion also raised a claim that defendant's conviction had been "obtained by use of [a] coerced confession", and asserted that his post-arrest statement had been secured by threats that a death sentence would be imposed if he failed to confess (R. 121). This claim is not being presented on this appeal.

3 Defendant testified through an interpreter (S.R. 3).

said, yes. He said, why? That is because I have no family here and I was scared that my mother should find out that they had -- that they had put me in the electric chair.

(S.R. 8). Defendant stated that Mr. Fields had told him that the circumstances of the case and his prior record were such that the trial judge would likely impose a death sentence (S.R. 17-18).

Defendant stated that he had had a conversation with Mr. Fields in the jury room on the morning of October 4, 1983, with the assistance of an interpreter (S.R. 24). He was questioned as follows by the prosecutor regarding the plea colloquy:

> Q. Now, after you spoke to Mr. Fields with the interpreter on Tuesday, you came out in front of the Court, this Judge right here, right?
> A. Yes.
>
> * * *
>
> Q. And the Judge asked you a lot of questions, right?
> A. To me? No. To the lawyer. I didn't speak that day.
> Q. You didn't speak that day at all?
> A. I spoke when I did this with my hand . . . .
> Q. When you took the oath, you talked and you talked no more?
> A. No. No.
> Q. Do you remember the judge . . . asking you whether or not you wanted to plead guilty?
> A. I remember that he asked me, but I plead guilty because the lawyer had told me that if I didn't they were going to give me the electric chair.
> Q. * * * You do remember him asking you if you wanted to plead guilty?
> A. Yes.
> Q. And you answer, at least on that Tuesday, was yes?
> A. Yes.
>
> * * *
>
> Q. And the judge asked you for your age

and little bit about your education background, right?

A. Yes.

Q. He asked you whether you were taking any drugs or had anything wrong with your head, right?

A. Yes. I think so. Yes.

* * *

Q. He asked you whether you understood, if you did plead guilty, that this was an agreement, a deal, which your attorney had worked out with me to save you from the electric chair and that you would have to spend at least 25 years in jail; the Judge asked you whether you understood what you were going to have to do. Do you remember that?

A. Yes. I remember.

Q. . . . You remember the judge asking you whether or not everything [counsel] did was okay with you, you were satisfied with him and you said, yes, it was okay with you?

A. No, I don't remember.

(S.R. 24-26).[4]

Mr. Fields testified that he had prepared defendant's case for trial, and had had several conversations with him, during which he advised defendant that the state had sufficient proof to proceed with a first-degree murder prosecution and a sentencing phase (S.R. 30-31). Mr. Fields recalled his conversation with defendant on the morning of the plea proceedings (S.R. 34), and testified that "[i]t was my opinion that I couldn't win the case, and . . . I certainly could have told him that." (S.R. 38). He also testified that defendant had maintained his innocence, but had expressed his willingness to accept the negotiated plea to a

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Defendant also testified that he recalled the recess which had been taken during the guilty-plea proceedings, and that Mr. Fields had spoken to him during the recess and "said that I had promised him that I was going to plead guilty . . . ." (S.R. 27).

life sentence (S.R. 33-34, 37-38). Mr. Fields did not specifically recall the plea colloquy (S.R. 34). He stated his opinion that defendant "plead guilty because he believed it was in his best interest, as I did." (S.R. 41).

At the conclusion of the hearing, the prosecutor advised the court that he had ordered a transcript of the guilty-plea proceeding (S.R. 43-44). The transcript of that proceeding was thereafter obtained and filed, as was the transcript of the suppression hearing (R. 128-96, 197-204; Tr. 2, 8-10). The court denied the motion on March 16, 1984 (Tr. 8).[5]

---

5 The court stated no findings of fact or law in denying the motion (S.R. 8). Its written order states "the allegations contained [in the motion] do not constitute legal grounds for granting a [n]ew [t]rial . . . ." (R. 249).

SUMMARY OF ARGUMENT

Both the United States Supreme Court and the Supreme Court of Florida expressly have held that a defendant must be advised of his privilege against self-incrimination and rights to a jury trial, to compulsory process, and to confront adverse witnesses, and must intelligently waive those rights prior to the entry of a guilty plea. The trial judge in this case failed to advise defendant adequately or to secure personal waivers of the rights which defendant abandoned by entering the plea.

Waivers of constitutional rights may not be presumed from a silent record, but rather must be demonstrated to be intentional relinquishments of known rights or privileges. The record of the plea proceedings in this case fails to establish valid waivers under this standard, and the testimony educed at the evidentiary hearing fails to remedy this deficiency. Defendant's guilty plea accordingly is constitutionally invalid.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHERE THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH THAT DEFENDANT HAD KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHTS TO A TRIAL BY JURY, CONFRONTATION OF ADVERSE WITNESSES, AND COMPULSORY PROCESS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, IN THE ENTRY OF HIS GUILTY PLEA TO THE CHARGES IN THIS CASE.

A guilty plea "is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or judge." Brady v. United States, 397 U.S. 742, 748 (1970). It is therefore fundamental that a guilty plea must be entered knowingly and intelligently, with full awareness of the consequences thereof. E.g., McMann v. Richardson, 397 U.S. 759, 766 (1970); Mikenas v. State, 460 So.2d 359, 361 (Fla. 1984); Ward v. State, 433 So.2d 1221, 1223 (Fla. 3d DCA 1983). The question presented in the present case is whether the record -- that is, the plea colloquy and the evidence presented to the trial court at the evidentiary hearing -- establish a knowing and intelligent guilty plea by defendant.[6]

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6 The specific claim in defendant's pro se motion to which this argument is directed avers that his conviction had been obtained "by [a] plea of guilty which was not made voluntarily with the understanding of the consequences of the plea." (R. 121). While the facts asserted in support of that claim are focused on defendant's fear of a death sentence, (R. 121), a fact which, standing alone, will not invalidate an otherwise-valid guilty plea, e.g., Brady v. United States, 397 U.S. at 755, the required liberal reading of the motion, e.g., State v. Stacey, No. 66,447 (Cont.)

Boykin v. Alabama, 395 U.S. 238 (1969), established the requisites for the waiver of constitutionally-guaranteed rights which is inherent in a guilty plea:

> Several constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.
>
> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence . . . .

Id. at 243-44 (footnote and citations omitted). This requirement is codified in Rule 3.172(c) of the Florida Rules of Criminal Procedure, which states in pertinent part:

> (c) . . . [T]he trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:
>
> * * *
>
> (iii) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.

(Fla. Oct. 17, 1985); Nova v. State, 439 So.2d 255, 259 (Fla. 3d DCA 1983), entitled defendant to litigate the constitutional validity of the plea.

• • •

> (v) That if he pleads guilty . . . there will not be a further trial of any kind, so that by pleading guilty . . . he waives the right to a trial . . . .

Fla.R.Crim.P. 3.172(c)(iii), (iv).

Discussing Boykin and the predecessor to Rule 3.172 in Williams v. State, 316 So.2d 267 (Fla. 1975), the Supreme Court of Florida held that the following are the "three essential requirements" of a valid guilty plea: "(1) the plea must be voluntary; (2) the defendant must understand the nature of the charges and the consequences of his plea; and (3) there must be factual basis for the plea." Id. at 271. In analyzing the second component, the court stated:

> [The accused] must also know that entry of a guilty plea constitutes a waiver of certain constitutional rights, specifically his right to remain silent, have a jury trial, have process to obtain witnesses on his behalf, and confront witnesses who are his accusers.

Ibid (citation omitted). Waivers of these fundamental rights must be by the accused, and cannot be waived by counsel in his or her stead. See, e.g., Brookhard v. Janis, 384 U.S. 1, 7-8 (1966).

The colloquy in this case is egregiously insufficient under these standards, and is not saved by the evidence presented to the trial court at the evidentiary hearing. The record of the plea proceedings shows that defendant spoke on only three occasions: first, to be sworn, second, to state his name, age, and say "Yes" when asked if he was "aware of the charges" (R. 199-200), and on a third occasion, which was the only time during

the entire course of the hearing when the court even touched upon the requirements of Boykin and Williams.

Prior to this inquiry, the court had advised defendant of the terms of the negotiated plea, and had twice asked defendant if he was electing to enter a guilty plea; defendant failed to answer, and a brief recess was taken for counsel to consult with defendant (R. 200). After this recess, the following transpired:

> The Court: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court if we were to, but which we are not having a trial.
>
> You are stipulating to a prima facie case of guilt here and need --
>
> Mr. Novick: I would ask the Court to [reply] on what we heard yesterday.
>
> The Court: I think we did hear during the suppression, no objection utilates [sic] those factors; [for] the purpose of finding a prima facie case of guilt.
>
> The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be give good aggravating -- one of which is involvement in the other similar type of case in the past. . . . But there was a death involved; was there not.
>
> Mr. Novick: Correct. Wasn't similar. In fact there was in Los Angeles.

(R. 200-01). Immediately after this statement was made by the prosecutor, defendant spoke for the third and last time in the proceedings, as follows:

> The Court: Mr. Torres, under the circumstances, is that what you are going to do?
>
> The Defendant: Yes.

(R. 201-02). The court then announced its judgment and sentence

(R. 202).

Thus, the court utterly failed to advise defendant, as required by Boykin, Williams, and Rule 3.712, of his privilege against self-incrimination, and his rights of confrontation and to compulsory process. But more importantly, the court failed to secure any waiver of any of the rights which the guilty plea abandoned by defendant himself; indeed, defendant was never even asked if he wished to plead guilty or was in fact doing so. The only occasion on which these matters arose, as detailed above, was when the court briefly touched on defendant's right to a jury trial and to an appeal, but that was followed by a discussion of the factual basis of the plea and the state's intention to seek death, and the court's ultimate question of "is this what you are going to do" addressed nothing in particular and was certainly not the specific inquiry mandated by Boykin and Williams.

The record of the plea proceeding utterly fails to prove an effective waiver of any rights under the controlling definition of a valid waiver of constitutional rights:

> "[C]ourts indulge in every reasonable presumption against waiver" of fundamental constitutional rights and . . . "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment of a known right or privilege. . . .

Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(footnotes omitted); accord, Boyd v. Dutton, 405 U.S. 1, 2-3 (1972); Carnley v. Cochran, 369 U.S. 506, 514-15 (1962); Mason v. State, 176 So.2d 76, 78 (Fla. 1965); Nova v. State, 439 So.2d 255, 262 (Fla. 3d DCA 1983). This standard was adopted in Boykin as the governing

rule for a waiver of constitutional rights in guilty-plea proceedings, 395 U.S. at 242, and the incomplete advice by the trial court, in combination with its failure to secure from defendant any meaningful waiver, establish the insufficiency of the colloquy and the invalidity of the plea.

Nor can the record of the evidentiary hearing be relied upon to cure these deficiencies; to the contrary, the testimony at that hearing simply re-affirms them. Counsel for defendant did not recall the colloquy (S.R. 34), and defendant's testimony with regard to the colloquy is a fairly accurate depiction of the court's inquiries and statements (S.R. 24-26).[7] The record of the hearing thus provides no support for a finding that defendant intelligently waived his privilege against self-incrimination and rights to a jury trial, compulsory process, and to confront adverse witnesses, at the time of the plea. Cf. State v. Brest, 421 So.2d 638 (Fla. 3d DCA 1982)(defendant's disavowal of plea at post-conviction hearing as product of confusion and fear legally insufficient to undo plea entered after thorough and constitutionally-sufficient inquiry by court).

---

7 Defendant initially stated that he had only spoken during the plea proceedings when placed under oath, but thereafter acknowledged that he had given his name and other identifying information (S.R. 24-25). However, under questioning by the prosecutor on cross-examination, defendant agreed that he had answered questions which had never been asked, e.g., regarding his mental state, and given answers which he had, in fact, never given at the proceeding, e.g., agreeing that he desired to plead guilty (S.R. 25-26). Defendant was never asked if he had known of the rights which his guilty plea had waived; the prosecutor relied upon the transcript of the plea proceeding to argue to the court that the colloquy had been constitutionally sufficient (Tr. 6).

A guilty plea "is an extremely important step in the criminal process and should not be hurried or treated summarily." Williams v. State, 316 So.2d at 271 (footnote omitted). It was "error, plain on the face of the record, for the trial judge to accept [defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. at 242.

CONCLUSION

Based upon the foregoing, defendant requests this Court to reverse the final order of the court below, and to remand this cause with directions to grant defendant's motion for post-conviction relief, vacate the judgment and sentence in this cause, and afford defendant an opportunity to plead anew to the charges against him.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, JIM SMITH, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128 this 29th day of October, 1985.

ELLIOT H. SCHERKER
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

* *

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Rule 3.170(J), Fla.R.Crim.P. 4

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Rule 3.172(i), Fla.R.Crim.P. 3, 6

INTRODUCTION

The Appellant, Urbano Torres, was the defendant in the trial court and the Appellee, the State of Florida, was the prosecution. In this brief, the Defendant will be referred to as Appellant and the State as the Appellee.

The symbol "R" will be utilized to designate the record on appeal and the symbol "S.R." the supplemental record of the February 6, 1984 hearing. All emphasis is supplied unless the contrary is indicated.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT"S MOTION FOR POST-CONVICTION RELIEF, WHERE THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH THAT DEFENDANT HAD KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHTS TO A TRIAL BY JURY, CONFRONTATION OF ADVERSE WITNESSES, AND COMPULSORY PROCESS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, IN THE ENTRY OF HIS GUILTY PLEA TO THE CHARGES IN THIS CASE.

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SUMMARY OF ARGUMENT

Appellant relies upon Rule 3.172, Fla.R.Crim.P. (1977) and various United States Supreme Court decisions in contending his plea of guilty to crimes of first degree murder and robbery must be set aside due to an inadequate plea colloquy. This contention does not justify reversal because Rule 3.172(i), supra, requires a showing of prejudice to render the plea void. Appellant fails to argue that he was prejudiced and the record provides ample evidence that Appellant was not prejudiced. Allen v. State, 463 So.2d 361 (Fla. 1st DCA 1985); Martinez v. State, 417 So.2d 770 (Fla. 2nd DCA 1982).

ARGUMENT

THE TRIAL COURT'S DENIAL OF A MOTION TO VACATE THE APPELLANT'S PLEA OF GUILTY SHOULD BE AFFIRMED WHERE THE APPELLANT FAILED TO ARGUE OR ESTABLISH PREJUDICE AS REQUIRED BY THE RULES OF CRIMINAL PROCEDURE AND THE UNITED STATES SUPREME COURT.

Rule 3.172, Fla.R.Crim.P. (1977) expanded former Rule 3.170(J), codified the Florida Supreme Court decision, Williams v. State, 316 So.2d 267 (1975) and thereby incorporated the necessary factors to satisfy federal constitutional standards on guilty pleas. Mikenas v. State, 460 So.2d 359, 361 (Fla. 1984). In applying this standard to the case sub judice it can be said the Appellant has described the exchange between the trial court, defendant and defense counsel in a fairly accurate manner. However, Appellant's suggestion that a certain inference be made in his favor contradicts the well established rules of appellate procedure on argument of such points. This contention regards Appellant's observation that no plea of guilty was ever entered by him and that his response of "yes" to the trial court's inquiry "Mr. Torres, under the circumstances, is that what are you going to do?", failed to relate to any particular matter. This plainly ignores the qualifying phrase "... under the circumstances ...", and the detailed recitation

of relevant considerations for the Appellant's consideration made by the trial court moment's before. (R. 200-02).

Appellee contends that the trial court's plea colloquy supports a ruling that the plea was entered voluntarily and with an understanding of the significance of the terms and conditions. Appellant's motions to vacate concedes the facts that he knew the nature of the charge and the penalty range at the time of the plea. (R. 121). The record reflects Appellant had a lawyer (appointed) who had handled every aspect of the case and attended each stage of proceedings with Appellant. (R. 111-16 and the record on appeal in general) (supplemental transcript of February 6, 1984 hearing, P. 29-36). Lastly, the record reflects the trial court told Appellant his plea would waive the right to a trial, by jury or judge, and the right to appeal. (R. 200). The testimony of Defense counsel, Mr. Fields at the February 6th hearing indicates the Appellant was aware of the terms of the plea - life imprisonment as opposed to death - prior to the entry of plea of guilty the following day. (S.R. 37-38). Lastly, the testimony of the various police witnesses regarding seized evidence and Appellant's confession presented during hearings before the same judge on three suppression motions (R. 9-12, 126-248) established an overwhelming case of guilty. This testimony was what

the prosecutor requested, without objection, to rely upon to prove a prima facie case of guilt. (R. 200). Transcripts of those hearings were introduced on this point during the hearing on the motion to vacate (R. 126-248) and the trial court noted his recollection of those hearings on the record. (S.R. 44). This process satisfies the minimum due process standards now at issue. Eisaman v. State, 440 So.2d 470, 472 (Fla. 5th DCA 1983).

Against this array of information the Appellant makes his constitutional claims. However, nowhere in the record or his appellate brief does Appellant address the issue of prejudice as required by Rule 3.172(i):

> Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

Accordingly his complaint is meritless. Martinez v. State, 417 So.2d 770, nt. 1 (Fla. 2nd DCA 1982); Kennedy v. State, ___ So.2d ___ (Fla. 2nd DCA case no. 84-2739, July 19, 1985)[10 F.L.W. 1769]; Allen v. State, 463 So.2d 351, 362-63 (Fla. 1st DCA 1985). Allen provides a footnote which lays this issue to rest:

> Rule 3.172, Florida Rules of Criminal procedure, is analogous to Federal Rule

of Criminal Procedure 11. Williams v. State, 361 So.2d [illegible] (Fla. 1st D.C.A. 1978). There have been many federal court decisions dealing with challenges to the validity of convictions where the requirements of rule 11 have not been met. These decisions almost uniformally hold that a showing of failure to comply with the rule is insufficient to void a conviction; there must also be a showing of prejudice to the defendant. In United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the defendant collaterally attacked his conviction on the ground that the trial judge did not properly comply with the formal requirements of rule 11 in that the court did not advise him of the application of a special parole term. The court denied relief to the defendant, noting that he "does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." Id. at 784, 99 S.Ct. at 2087. The Court held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." Id. at 785, 99 S.Ct. at 2088. (case citations omitted).

Id. at 463.

The Timmreck decision has applicability in this case.

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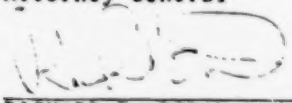
CONCLUSION

Based upon the above-cited legal authorities Appellee requests this Honorable Court affirm the order denying the motion to vacate guilty plea.

Respectfully submitted,

JIM SMITH
Attorney General



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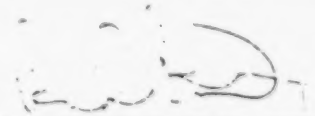
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 19th day of December, 1985.



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